TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963 4

No. [redacted] 8

ROBERT L. SCHLAGENHAUF, PETITIONER,

vs.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA.

PETITION FOR CERTIORARI FILED OCTOBER 18, 1963

CERTIORARI GRANTED JANUARY 13, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 569

ROBERT L. SCHLAGENHAUF, PETITIONER,

vs.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA.

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 13, 1964

[fol. 1] [File endorsement omitted]

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF, Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Respondent.

PETITION FOR WRIT OF MANDAMUS TO HONORABLE CALE J. HOLDER, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA—Filed March 13, 1963

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

1. Your petitioner, Robert L. Schlagenhauf, is a citizen and resident of the State of Indiana and is a party defendant in an action instituted in the United States District Court for the Southern District of Indiana, on July 17, 1962, entitled John Anthony Markiewicz, a minor, by his father and next friend, Edward Markiewicz, and Edward Markiewicz and Jennie Markiewicz in their own right v. The Greyhound Corporation, Robert L. Schlagenhauf, Joseph L. McCorkhill and Contract Carriers, Inc., No. IP 62-C-285, assigned to the calendar of Honorable Cale J. Holder, Judge of said District Court. On November 8, 1962, an amended complaint was filed by the plaintiffs naming National Lead Company, a corporation, as an additional defendant.

2. In the said action, the plaintiffs seek to obtain damages for personal injuries and loss of services by reason of the defendants' alleged negligence in causing a collision between a bus owned by the defendant The Greyhound Corporation and driven by the defendant Robert L. Schlagen-

hauf and a trailer owned by the defendant National Lead Company and pulled by a tractor owned by the defendant Contract Carriers, Inc. and driven by the defendant Joseph L. McCorkhill, on July 13, 1962 in Hendricks County, [fol. 3] State of Indiana.

3. On July 30, 1962, the defendant The Greyhound Corporation in said action filed its cross-claim against the defendants Contract Carriers, Inc. and National Lead Company and on January 21, 1963 filed its amended cross-claim against Contract Carriers, Inc., National Lead Company, and General Motors Corporation, an added defendant. In the said amended cross-claim, the defendant The Greyhound Corporation seeks to obtain damages for the damage to its motor bus and for the loss of use thereof by reason of the alleged negligence of the named cross-defendants in causing the said collision.

4. At the time the said actions of the plaintiffs were commenced, the plaintiffs were citizens of the State of Pennsylvania; the defendant The Greyhound Corporation was a corporation organized and existing under the laws of the State of Delaware with its principal office in the State of Illinois; the defendant Contract Carriers, Inc. was a corporation organized and existing under the laws of the State of Indiana with its principal office in the State of Indiana; the defendant Joseph L. McCorkhill was a citizen of the State of Indiana; and the defendant National Lead Company was a corporation created and existing under the laws of the State of New Jersey with its principal office in the State of New York, and the amounts in controversy exceed the sum of $10,000 exclusive of interest and costs.

5. On February 5, 1963, the defendants Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company filed their joint petition for an order requiring the defendant Robert L. Schlagenhauf to submit to physical and mental examinations "by a competent, qualified specialist" in each of the fields of internal medicine, ophthalmology, neurology, and psychiatry on the stated ground that "the physical and mental condition of the defendant Robert L. Schlagenhauf, is in controversy and is at issue in this

action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of [fol. 4] affirmative answer on the part of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, to the defendant Greyhound's cross-claim." The said petition further nominated two named physicians in the field of internal medicine, two in the field of ophthalmology, three in the field of neurology, and two in the field of psychiatry and asked that one physician in each such category be appointed.

6. On February 21, 1963 the Honorable Cale J. Holder entered an order sustaining the said petition and ordering the defendant Robert L. Schlagenhauf to submit to physical and mental examinations by all nine of the physicians nominated in the petition and that the nine examinations be completed by April 1, 1963. Copies of the order complained of, the petition for such order, the plaintiffs' amended complaint, the amended cross-claim of the defendant The Greyhound Corporation, the answer of defendants Contract Carriers, Inc. and Joseph L. McCorkhill to the original cross-claim and letter amending such answer are attached hereto, marked as Exhibits "A", "B", "C", "D", "E", and "F" respectively, and made a part hereof.

7. The issuance of the said order constitutes a clear abuse of discretion and grave miscarriage of justice in the following particulars:

(a) The petitioner Robert L. Schlagenhauf is not a party to the amended cross-claim in which the petitioning cross-defendants assert that the physical and mental condition of Robert L. Schlagenhauf is in controversy.

(b) The physical and mental condition of the petitioner Robert L. Schlagenhauf is not "in controversy" in either the plaintiffs' amended complaint or the amended cross-claim.

(c) Good cause has not been shown for the multiple examinations petitioned for by the cross-defendants.

(d) The petitioner Robert L. Schlagenhauf has been ordered to submit to nine separate physical and mental ex-

aminations even though the petition of the cross-defendants asked for only four such examinations.

[fol. 5] (e) The order of the respondent being not made in conformity to Rule 35 of the Federal Rules of Civil Procedure violated the petitioner Robert L. Schlagenhauf's substantive right of privacy and his constitutional rights under the 4th, 5th, and 13th Amendments of the Constitution of the United States.

Wherefore, petitioner prays that a writ of mandamus issue out of this court directed to the said Honorable Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, commanding him to vacate said order for the physical and mental examinations of Robert L. Schlagenhauf entered by him on February 21, 1963, and to do and perform such other acts and things as may be necessary and proper in the premises.

Smith & Yarling, By Robert S. Smith, 1313 First Federal Building, Indianapolis 4, Indiana.

Verification (omitted in printing).

[fol. 6]

EXHIBIT "A" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

ENTRY FOR February 21, 1963

Honorable Cale J. Holder, Judge

This cause came before the court upon the petition of the defendants, Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company for an order to examine, physically and mentally, the defendant, Robert L. Schlagenhauf and the court having considered said petition and it appearing that the physical and mental examination of the defendant, Robert L. Schlagenhauf, is within the purview of the said Rules of Civil Procedure and can be had without physical or mental embarrassment or cost to the defendant, Robert L. Schlagenhauf; that the evidence sought therein is not cumulative and cannot be had by any other means and that said motion is made in good faith on issues in controversy and is not for the purpose of delay, which said petition is hereby sustained and it is

ORDERED, that the defendant, Robert L. Schlagenhauf, [fol. 7] hereby submit to physical and mental examinations by the following physicians:

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Ophthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

these examinations to be conducted at times convenient to the parties and by agreement of the parties, to be completed no later than the 1st day of April, 1963, at the offices of the physicians listed above and if the time for taking said examinations cannot be reached by agreement, the court will then establish a time certain for the taking of said examinations.

CALE J. HOLDER
United States District Judge

Copies to: Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Bldg. 111 Monument Circle, Indianapolis, Ind.;

Rocap, Rocap & Reese, 156 E. Market, Indianapolis, Ind.;

Townsend and Townsend, 120 E. Market, Indianapolis, Ind.

A. L. Payne, 501 Fidelity Bldg., Indianapolis, Ind.

Smith & Yarling, 1313 First Federal Bldg., Indianapolis, Ind.

Sheldon A. Breskow, 930 Lemcke Bldg., Indianapolis, Ind.

Edmund Pawelec, 517 Western Savings Fund Bldg., Philadelphia, 7, Pa.

[fol. 8]

EXHIBIT "B" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

PETITION FOR PHYSICAL EXAMINATION OF DEFENDANT, ROBERT L. SCHLAGENHAUF

Come now the defendants, Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company and under the provisions of Rule 35 of the Rules of Civil Procedure, now respectfully petition the court for an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by a competent, qualified specialist in each of the following fields:

(1) Internal medicine; (2) Ophthalmology; (3) Neurology; (4) Psychiatry.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, to the defendant Greyhound's cross claim.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, can only be determined by competent experts, no one of which can examine the defendant [fol. 9] Schlagenhauf respective to all of the conditions which relate to his driving ability. These defendants respectfully request that one physician in each of the above listed categories be appointed and in this regard would respectfully shows to the court that there are competent, qualified individuals in the respective fields as follows:

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Ophthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

These examinations can be performed without physical or mental suffering or embarrassment to the defendant,

Robert L. Schlagenhauf and without cost to said defendant. The evidence sought by such examinations cannot be produced by other witnesses and is not cumulative, as inquiry into such areas is limited to those persons qualified by training, education and experience and is not a subject of knowledge to the common layman.

Further reason for a physical and mental examination of the defendant Schlagenhauf is shown by Exhibit "A", an affidavit of one of defendant Contract Carriers, Inc. and Joseph L. McCorkhill's attorneys involving the following issues:

(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

(2) The lights of the tractor trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.

[fol. 10] (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

Without examinations by a competent qualified physician in each of the fields as listed above, these defendants will be without means to properly present evidence on this issue and will be unable to properly present their defense.

Wherefore, the defendants, Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company, respectfully pray that this court issue an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by one qualified specialist in the fields of internal medicine, ophthalmology, neurology and psychiatry, at a time convenient for the physicians and the defendant, Robert L. Schlagenhauf.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

ROCAP, ROCAP & REESE

By /s/ KEITH REESE
Keith Reese

Attorneys for National Lead Company

BRIEF IN SUPPORT OF PETITION FOR PHYSICAL AND MENTAL EXAMINATION

Rule 35 of the Federal Rules of Civil Procedure provides as follows:

"Rule 35. Physical and Mental Examination of persons.

(a) Order for Examination. *In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician.* The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions and scope [fol. 11] of the examination and the person or persons by whom it is to be made." (Emphasis added).

In the instant case, Robert L. Schlagenhauf is a named party defendant and the mental and physical condition of this defendant is in controversy.

The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have asserted that the defendant, Robert L. Schlagenhauf, did not have a proper mental or physical condition to operate a scenicruiser motorbus and that for this reason, the vehicles collided. If the defendant, Robert L. Schlagenhauf, was either mentally or physically unqualified to operate such a vehicle, then this truth should be

ascertained and the facts laid out for all to see. These examinations can be performed without any pain or suffering or mental embarrassment to the defendant, Robert L. Schlagenhauf.

The issue of whether or not a defendant may be examined under Federal Rule 35(a) was also before the court in *Dinsel* v. *Pennsylvania Railroad Co.*, 144 F. Supp. 880 (W. D. of Pa. 1956), where the court was concerned with the problem of whether or not one who was not even a party could be examined and the court, at page 882, stated as follows:

> "(1, 2) It is the duty of the court to make positive that every trial is fairly and impartially conducted and that the verdict of the jury be rendered on the issues raised by the pleadings. It would, therefore, appear to be the duty of the court to make positive that the jury would not have to speculate or conjecture as to the condition of the eyesight of the employee, Echenrode, and to extend every help that might be possible, through the aid of medical science, to enlighten the court and jury of the vision of Echenrode on the date that the accident occurred.
>
> (3, 4) I believe authority exists in the District Court, when necessary to a proper consideration of a case by a court and jury, to appoint, without consent of the parties, an appropriate specialist in the field where a disputed issue of fact is raised, to express an opinion on the facts in dispute without prejudice, however, of either party to call, examine and cross-examine witnesses as if said examination had not been directed by the court, and that the examination made by order of court shall function as prima facie evidence of the facts found and conclusions reached, unless rejected by the court. It is further proper to tax the costs of such an examination together with the fees of said witnesses as costs of a case. Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919."

[fol. 12] We are not unmindful of the cases exemplified by *Kropp* v. *General Dynamics Corp.*, 202 F.Supp. 207 (E.D. Mich. 1962); *Fong Sik Leung* v. *Dulles*, 226 F.2d 74 (9th Cir. 1955); *Dulles* v. *Quan Yoke Fong*, 237 F.2d 496 (9th Cir. 1956), which have limited the power of the courts to require physical examination of those who are not parties to the action. However, as previously pointed out, Mr. Schlagenhauf is a defendant and is a party to the action and thus, the rules as established by these cases have no bearing upon the instant issue.

RESPECTFULLY SUBMITTED,

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

BY /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

ROCAP, ROCAP & REESE

BY /s/ KEITH REESE
Keith Reese

Attorneys for National Lead Company

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, hereby certifies that a copy of the above and foregoing pleading was delivered to:

Townsend and Townsend
403 Indiana Building
120 E. Market
Indianapolis, Indiana
Attorneys for the plaintiffs, Markiewicz,

and

Smith and Yarling
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for defendants, The Greyhound Corp and Robert L. Schlagenhauf,

and

Mr. A. L. Payne
Lewis, Weiland, Payne
& Carvey
501 Fidelity Building
Indianapolis 4, Indiana

Sheldon A. Breskow
930 Lemcke Bldg.
Indianapolis 4, Indiana

Attorneys for plaintiff, Charles Jones.

and

mailed to:

[fol. 13] Mr. Edmund Pawelec
Attorney at Law
517 Western Savings Fund Bldg.
Philadelphia 7, Pa.
Attorney for plaintiffs Markiewicz

this 5th day of February, 1963.

/s/ Harry A. Wilson, Jr.
Harry A. Wilson, Jr.

[fol. 14]

Exhibit "A" to Exhibit "B"

State of Indiana)
) ss.
County of Marion)

Affidavit of One of Defendant's Counsel

Harry A. Wilson, Jr., being duly sworn on his oath, deposes and says:

(1) That he is a partner in the firm of Armstrong, Gause, Hudson & Kightlinger, authorized and admitted to practice before the United States Federal District Court for the Southern District of Indiana and is one of the attorneys of record for the Defendant, Contract Carriers, Inc. and Joseph L. McCorkhill.

(2) That by his own admission, the defendant, Robert L. Schlagenhauf, in his deposition taken on August 9, 1962, admitted that he saw red lights for 10 to 15 seconds prior to a collision with a semi-tractor trailer unit and yet drove

his vehicle on without reducing speed and without altering the course thereof.

(3) The only eye-witness to this accident known to this affiant, Lewis Stone, testified that immediately prior to the impact between the bus and truck that he had also been approaching the truck from the rear and that he had clearly seen the lights of the truck for a distance of three-quarters to one-half mile to the rear thereof.

(4) The defendant, Robert L. Schlagenhauf, has admitted in his deposition taken on August 9, 1962, that he was involved in a similar type rear end collision while operating a motorbus near Flatrock, Michigan, in which parties were injured prior to the collision with the semi-tractor trailer unit of the defendant, Contract Carriers, Inc.

(5) A physical examination in the four specialty fields, as set out in defendant's Contract Carriers, Inc. and Joseph L. McCorkhill, petition can be performed without pain, suffering or mental embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant and only through such examinations can the true status and condition of the mental and physical condition be ascertained.

(6) The specialties of internal medicine, ophthalmology, neurology and psychiatry require extensive training and are not within the common knowledge of the average layman and thus, without examination by specialist, no one will be able to testify upon this important issue which is in controversy in this case.

Further, Affiant sayeth not.

/s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

SUBSCRIBED and sworn to before me this 5th day of February, 1963.

Margaret Gordon, Notary Public

My commission expires 8-6-66

[fol. 15]

EXHIBIT "C" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ in their own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants,

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

AMENDED COMPLAINT FOR DAMAGES

COUNT I

1. The plaintiff in this Count is JOHN ANTHONY MARKIEWICZ, a minor age 17 suing by his father and next friend, EDWARD MARKIEWICZ.

2. Said plaintiff is a citizen of and resides at 132 Beck Street, Philadelphia, Pennsylvania.

3. The defendant, THE GREYHOUND CORPORATION, is a common carrier of passengers for hire and is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the State of Illinois.

4. The defendant, CONTRACT CARRIERS, INC., is a corporation organized and existing under and by virtue of the

laws of the State of Indiana with its principal place of business in the State of Indiana.

5. The defendant, ROBERT L. SCHLAGENHAUF, is an individual residing at 102 N. Drexel Avenue, Indianapolis, Indi- [fol. 16] ana, and was the driver of the Greyhound G.M.C. motor bus involved in the accident hereinafter described.

6. The defendant, JOSEPH L. MCCORKHILL, is an individual residing at Rural Route 6, Anderson, Indiana, and was the driver of the tractor-trailer unit involved in this accident.

7. The third-party defendant, NATIONAL LEAD COMPANY, is and was at all times herein complained of a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in the State of New York.

8. The matter in controversy herein, exclusive of interest and costs, exceeds the amount of $10,000.00.

9. That U.S. Highway 40 is a paved blacktop public highway laid out in an east-west direction as it passes through the State of Indiana and particularly in Liberty Township of Hendricks County at a point about 1.6 miles west of Belleville.

10. That at said location 1.6 miles west of Belleville said U.S. Highway is so constructed that there are two east-bound traffic lanes passing over a 24-foot roadway which is divided from west-bound traffic by an intervening unimproved grass medial strip approximately 33 feet wide.

11. That said two east-bound lanes at all points herein complained of were divided by clearly painted broken white lines in the middle of said 24-foot roadway.

12. That the Indiana State Highway Commission had determined and sign-posted said location as being under a 65 mile per hour speed limit.

13. That on July 13, 1962 at about 1:05 A.M. and in darkness plaintiff John Anthony Markiewicz and his mother, plaintiff Jennie Markiewicz were paid passengers riding in

said 1957 G.M.C. motor bus owned and operated by defendant The Greyhound Corporation as it proceeded eastward [fol.17] along said U.S. Highway 40.

14. Said bus was driven by defendant Robert L. Schlagenhauf who was the duly constituted and acting employee and agent of The Greyhound Corporation.

15. Proceeding along said U. S. Highway 40 at some distance ahead of said bus was a 1960 G.M.C. tractor towing a Trailmobile trailer loaded with powdered lead and having a gross weight of 71,440 pounds.

16. Said tractor was being driven by defendant Joseph L. McCorkhill and was owned by defendant Contract Carriers, Inc.

17. Joseph L. McCorkhill was the duly constituted and acting agent and employee of defendant Contract Carriers, Inc. as he was driving its tractor along said highway.

18. Said Trailmobile trailer was owned by third-party defendant National Lead Company.

19. At all times herein complained of defendant Contract Carriers, Inc. was the duly constituted and acting agent of third-party defendant National Lead Company towing said trailer in connection with the business of National Lead Company.

20. At all times herein complained of defendant Joseph L. McCorkhill was the agent of defendant National Lead Company and as such was towing said trailer in connection with the business of National Lead Company.

21. That at said location about 1.6 miles west of Belleville and at said time said bus collided with the rear of said trailer causing the bus to be sheared apart and injuring John Anthony Markiewicz and his mother as hereinafter will appear.

22. That at the time of and immediately prior to said collision, defendants The Greyhound Corporation and Robert L. Schlagenhauf were negligent and careless in one or more of the following respects:

[fol. 18] a) Failed to keep a reasonable lookout for other vehicles using the highway in front of them and particularly the tractor-trailer unit which they struck.

b) Drove at a speed which was greater than was reasonable and prudent, taking into consideration the fact that they were driving a large two-story Super Scenicruiser carrying 43 passengers at nighttime and were approaching said tractor-trailer unit, to-wit: 75 miles per hour.

c) Failed to maintain proper control of said bus by reducing the acceleration, applying the brakes and steering same as they overtook said tractor-trailer unit.

d) Failed to restrict their speed as necessary to avoid colliding with said tractor-trailer unit on the highway ahead of them.

e) Drove said bus at a speed greater than the maximum number of miles per hour for said location which had been determined and sign-posted as a speed limit by the Indiana State Highway Commission, to-wit: they drove at 75 miles per hour where the posted limit was 65 miles per hour.

f) Although they were rapidly overtaking said tractor-trailer unit they failed to pass to the left thereof at a safe distance but instead they drove directly into the rear of the trailer.

g) Failed to blow their horn or give any audible signal of their intention to pass said tractor-trailer unit.

23. That at the time of and immediately prior to the collision defendants Contract Carriers, Inc., National Lead Company and Joseph L. McCorkhill were negligent and careless in one or more of the following respects:

a) Operated the tractor-trailer unit at such a low speed as to impede the normal and reasonable movement of traffic, to-wit: 20 miles per hour on said highway having a 65 mile per hour speed limit.

b) Although they operated the tractor-trailer unit at a speed less than the normal speed of traffic at the time and place then existing they nevertheless failed to operate entirely within their righthand lane and as close as practicable to the righthand edge of said roadway but instead they operated with the northernmost part of said trailer in their lefthand lane.

c) They operated said trailer at nighttime without having thereon sufficient and proper clearance lamps on the rear thereof capable of being seen and distinguished under the then normal existing conditions for a distance of 500 feet from the rear so as to show the extreme width of the trailer and so as to clearly demonstrate where the rear end of the trailer was.

[fol. 19] d) They towed said heavy trailer weighing 71,400 pounds loaded with powdered lead along said heavily traveled U. S. highway with a tractor which they knew or in the exercise of reasonable care should have known did not have sufficient capacity or power to tow the trailer at a sufficient speed to avoid impeding the normal flow of traffic.

24. That as a direct result of said collision plaintiff John Anthony Markiewicz suffered the following injuries, losses and damages:

a) Traumatic amputation of right leg below the knee.

b) Further surgical amputation of the right leg above the knee was required.

c) Multiple compound fractures of the pelvis, superior and inferior rami.

d) Bilateral compound fractures of the pubis and ischial bones.

e) Bilateral separation of the sacroiliac joints.

f) Multiple fractures of the spine, with anterior wedging of the 2nd, 3rd, and 4th lumbar vertebrae.

g) Comminuted fracture of the body of the 3rd lumbar vertebra with lumbar scoliosis concabity to the right.

h) Lacerated bladder.

i) Traumatic contusing and tearing of the urethra.

j) Partial avulsion loss of right hemiscrotum.

k) Large lacerating cuts through the muscles and tissues of the medial aspects of both thighs.

l) Severe laceration of perineum.

m) Severe laceration of left hemiscrotum.

n) Severe shock tc his physical and nervous system.

o) Multiple abrasions and bruises on both arms, the neck and chest.

p) He suffered the loss of a great amount of blood and was compelled to receive 17 blood transfusions of 500 cc. each.

q) He had to undergo several surgical exploratory operations including a laparotomy.

r) He was unable to urinate through his penis and [fol. 20] a supra pubic cystotomy catheter had to be inserted directly into his bladder for many days.

s) He was placed on his back with his stump in traction for many days.

t) He suffered much infection and drainage in the large thigh lacerations and the lacerations of the scrotum and perineum.

u) He was placed in a tight body cast and a corset to pull the pelvic fractures together.

v) He was placed in a pelvic sling.

w) He has endured great pain, anxiety and mental anguish.

x) He has been compelled to take many drugs to relieve pain.

y) His ability to work and earn a living and to get an education and to enjoy life in a normal manner has been destroyed.

z) His ability to reproduce and have children probably has been destroyed.

A) His appearance has been ruined and he will never walk normally.

B) He has suffered severe psychic trauma and personality change.

C) He will suffer pain and inconvenience for the rest of his life.

D) He will suffer medical costs and expenses for the rest of his life due to said injuries.

E) His normal life expectancy has been reduced.

25. That all of said injuries, losses and damages to plaintiff John Anthony Markiewicz were proximately caused by the wantonness, gross negligence and carelessness of the defendants and third party defendant and each of them as set forth in rhetorical paragraphs 22 and 23 above.

WHEREFORE, plaintiff John Anthony Markiewicz prays for compensatory damages against the defendants and each of them in the sum of One Million ($1,000,000.00) Dollars and exemplary damages against the defendants and third [fol. 21] party defendant and each of them in the sum of Three Hundred Thousand ($300,000.00) Dollars.

COUNT II

The plaintiff Jennie Markiewicz now complains of the defendants and third party defendant and each of them and alleges:

1. She is a citizen of Pennsylvania residing at 132 Beck Street in Philadelphia.

2. She incorporates by reference paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 of Count I.

24. That plaintiff Jennie Markiewicz suffered the following injuries, losses and damages:

a) Concussion and contusion of the brain.

b) Severe bruising of the head and face with blackening of both eyes.

c) Sprain and strain of the muscles, ligaments and nerves of the neck and back.

d) Fractures of both hips.

e) Severe comminuted compound fractures of the right leg.

f) Severe shock.

g) Bruising of all of her internal organs.

h) Bruising of her left leg.

i) She endured great pain and mental anguish.

j) Her injuries to her head, neck, back, hips and legs are permanent.

k) She will have to lay out reasonable sums in attempting to cure herself in the future.

l) She will lose earnings and earning capacity.

[fol. 22] 25. All of said injuries, losses and damages were proximately caused by the wantonness, gross negligence and carelessness of the defendants and third party defendant and each of them as set forth in rhetorical paragraphs 22 and 23.

Wherefore plaintiff Jennie Markiewicz prays for compensatory damages against the defendants and third party defendant and each of them in the sum of Three Hundred Thousand ($300,000.00) and exemplary damages against the defendants and third party defendant and each of them in the sum of Fifty Thousand ($50,000.00) Dollars.

Count III

1. The plaintiff in this count is Edward Markiewicz, the father of John Anthony Markiewicz and the husband of Jennie Markiewicz.

2. Plaintiff is a citizen of Pennsylvania and resides at 132 Beck Street, Philadelphia.

3. By reference he incorporates paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 of Count I the same as if set forth fully herein.

24. That as a result of the injuries to John A. Markiewicz and Jennie Markiewicz plaintiff Edward Markiewicz has suffered losses and damages in the following respects:

a) He has been compelled to lay out large sums for the treatment and care of said son and wife in the following reasonable amounts:

Hospitals	$15,000.00,
Doctors	$ 5,000.00.

b) He has had to purchase medicines and braces of the reasonable value of $350.00.

c) He has been compelled to pay for transportation to visit them and for airplanes and ambulances to get them to Philadelphia in the reasonable sum of $1,500.00.

d) He will have to pay future reasonable medical and hospital expenses in the sum of $10,000.00 for their care.

[fol. 23] e) He has lost the services and companionship of both of them ever since the accident.

f) He has lost the consortium of his wife.

25. That all of said losses and damages to plaintiff, Edward Markiewicz, were proximately caused by the wantonness, gross negligence and carelessness of the defendants and third party defendant and each of them as set forth in paragraphs 22 and 23.

WHEREFORE, plaintiff Edward Markiewicz prays judgment against the defendants and third party defendant and

each of them in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars and for all other proper relief.

EDMUND PAWELEC

517 Western Saving Fund Bldg.
Broad & Chestnut Streets
Philadelphia, Pennsylvania

TOWNSEND & TOWNSEND

403 Indiana Building
Indianapolis 4, Indiana
ME 7-1537

By /s/ EARL C. TOWNSEND
Attorneys for Plaintiffs

Copies mailed to opposing counsel, Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Building, Indianapolis, Indiana, Smith & Yarling, 13 North Pennsylvania Street, Indianapolis 4, Indiana and Rocap, Rocap & Reese, 156 East Market Street, Indianapolis 4, Indiana this 8th day of November, 1962.

/s/ EARL C. TOWNSEND

[fol. 24]

EXHIBIT "D" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ,

Plaintiffs,

—vs.—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, General Motors Corporation,

Defendants.

AMENDED CROSS-CLAIM

The defendant The Greyhound Corporation, for cross-claim against the defendant Contract Carriers, Inc., the defendant National Lead Company, and the defendant General Motors Corporation, states:

1. The cross claimant, The Greyhound Corporation, is and was at all times mentioned herein a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Illinois, and is and was at all such times the owner of a certain G.M.C. Motor Bus, model 4501, designated Super Scenicruiser.

2. On the 13th day of July, 1962, at about the hour of 1:10 A.M. the cross-defendant Contract Carriers, Inc. by and through its agent and employee Joseph L. McCorkhill was operating its certain G.M.C. tractor towing a Trailmobile trailer owned by the cross-defendant National Lead Company eastward on United States Highway No. 40 in Hendricks County, State of Indiana, at a point about 1.6 miles west of Belleville, Indiana and then and there carelessly and negligently caused the cross-claimant's said G.M.C. Motor Bus to collide with the left rear corner of the said Trailmobile trailer, proximately resulting in damage to the [fol. 25] said bus as hereinafter more particularly described.

3. The said carelessness and negligence of the cross-defendant Contract Carriers, Inc. as acting by and through its said agent and employee consisted of one or more of the following acts and omissions:

(a) Contract Carriers, Inc. operated its tractor at such a low speed as to impede the normal and reasonable movement of traffic and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2006—"No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law."

(b) Contract Carriers, Inc. failed to operate its tractor and the trailer towed by it as nearly as practicable entirely within a single lane of the four laned U. S. Highway 40 at the scene of the collision aforesaid but instead operated the said tractor-trailer combination in part in the southermost traffic lane of the said highway and in part in the adjacent lane to the north and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2018—"Whenever any roadway has been divided into three (3) or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply: (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

(c) Contract Carriers, Inc. operated the said tractor-trailer combination at a speed less than the normal speed of traffic at the time and place under the conditions then existing and failed to operate the said unit in the right-hand lane then available for traffic or as close as practicable to the right-hand edge of the roadway but instead operated with part of the said trailer in the southermost or right-hand lane of U. S. Highway 40 and part of the adjacent lane to the north thereof and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2010—" . . . S. Upon all roadways any vehicle [fol. 26] proceeding at less than the normal speed of traffic at the time and place under the conditions then existing shall be driven in the right-hand lane then available for traffic or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway."

(d) Contract Carriers, Inc. towed the said trailer along the highways of the State of Indiana in the nighttime although the said trailer was of a tonnage greatly in excess of 3,000 pounds and was not equipped with clearance lights upon the rear thereof and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2208—"In addition to other equipment required in this act, the following vehicles shall be equipped as herein stated under the conditions stated in section 9 (Sec. 47-2207):
>
> . . . (d) 'On every trailer or semi-trailer having a gross weight in excess of 3,000 pounds: . . . On the rear, two (2) clearance lamps, one at each side . . .'"

(e) Contract Carriers, Inc. towed the said trailer along the highways of the State of Indiana in the nighttime although said trailer was not equipped with rear clearance lamps mounted on the permanent structure of the trailer in such a manner as to indicate its extreme width and as near the top of the rear of the said trailer as practicable and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2210—. . . (b) "Clearance lamps shall be mounted on the permanent structure of the vehicle in such a manner as to indicate its extreme width and as near the top thereof as practicable. Clearance lamps and side marker lamps may be mounted in combination provided illumination is given as required herein with reference to both."

(f) Contract Carriers, Inc. towed the said trailer along the highways of the State of Indiana in the nighttime although said trailer was not equipped with rear clearance lamps capable of being seen and distinguished under normal atmospheric conditions at a distance of 500 feet from the rear of the said trailer and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

[fol. 27] Burns 47-2211—"... (b) Front and rear clearance lamps shall be capable of being seen and distinguished under normal atmospheric conditions at the times lights are required at a distance of 500 feet from the front and rear, respectively, of the vehicle."

(g) Contract Carriers, Inc. operated along the highways of the State of Indiana at a slow speed in the nighttime a tractor-trailer combination which constituted a vehicular traffic hazard in that the said trailer was painted gray in color which was difficult to see on the darkened highway, was not equipped with clearance lights on the upper rear part of the trailer providing sufficient illumination to be effectively seen to the rear thereof, was of a skeletal construction which was difficult to distinguish in the dark, and was equipped with three identification lights which were mounted at a position approximately sixteen (16) feet from the rear of the said trailer and which gave the appearance and illusion to traffic approaching from the rear that the rear of the said trailer was at the location of the said identification lights, and the said Contract Carriers, Inc. failed and refused to provide the said trailer, though constituting such traffic hazard, with additional warning lamps on the rear thereof notwithstanding the permission to do so granted by the following statute of the State of Indiana which was then and there in full force and effect:

Burns 47-2218—"... (d) Any vehicle may be equipped with lamps which may be used for the purpose of warning the operators of other vehicles of the presence of a vehicular traffic hazard requiring the exercise of unusual care in approaching, overtaking or passing, and when so equipped may display such warning in addition to any other warning signals required by this act. The lamps used to display such warning to the front shall be mounted at the same level and as widely spaced laterally as practicable, and shall display simultaneously flashing white or amber lights, or any shade of color between white and amber. The lamps used to display such warning to the rear shall be mounted at the same level and as widely spaced laterally as prac-

ticable, and shall show simultaneously flashing amber or red lights, or any shade of color between red and amber. These warning lights shall be visible from a distance of not less than 500 feet under normal atmospheric conditions at night."

(h) Contract Carriers, Inc. towed the said trailer in interstate commerce along the highways of the State of [fol. 28] Indiana in the nighttime although said trailer was more than 80 inches in width and was not equipped on the rear thereof with clearance lamps or rear identification lamps, the said trailer being equipped instead with identification lamps located approximately sixteen (16) feet forward of the rear of the said trailer, and Contract Carriers, Inc. thereby violated the following safety regulation duly ordered by the United States Interstate Commerce Commission which was then and there in full force and effect:

"193.14 Lamps and reflectors, large semitrailers and pole trailers.

Every semitrailer or pole trailer 80 inches or more in overall width, except converter dollies, shall be equipped as follows:

(a) On the front, two clearance lamps, one at each side.

(b) On the rear, two tail lamps, one at each side; two stop lamps, one at each side; two clearance lamps, one at each side; two reflectors, one at each side; three identification lamps, mounted on the vertical center line of the vehicle, provided that the identification lamps need not be lighted if obscured by another vehicle in the same combination."

(i) Contract Carriers, Inc. operated the said tractor-trailer along the highways of the State of Indiana without maintaining a proper lookout for traffic approaching from the rear.

(j) Contract Carriers, Inc. attempted to tow a loaded trailer with a gross weight of approximately thirty-six (36) tons upon the public highways in the nighttime with a tractor which did not have sufficient power to pull the said

trailer at a speed sufficient to avoid impeding the normal and reasonable movement of traffic upon United States Highway 40 at and near the scene of the said collision.

(k) Contract Carriers, Inc. attempted to tow a loaded trailer with a gross weight of approximately thirty-six (36) tons upon the public highways in the nighttime with a tractor which the said defendant knew was defective in that its accelerator linkage was so placed or designed that the tractor could not be operated with sufficient power to pull the said trailer at a speed sufficient to avoid impeding the normal and reasonable movement of traffic upon United States Highway 40 at and near the scene of the said collision.

[fol. 29] (l) Contract Carriers, Inc. caused and knowingly permitted to be driven and moved on the said U. S. Highway 40 a vehicle which was in such unsafe condition as to endanger other persons using the said highway and which vehicle was not equipped with lamps in proper condition and adjustment as required by law, and Contract Carriers, Inc. thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2201 "(a) It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain these parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, or which is equipped in any manner in violation of this article, or for any person to do any act forbidden or fail to perform any act required under this article."

(m) Contract Carriers, Inc. operated the said tractor-trailer along the highways of the State of Indiana at a time when the lighting equipment upon the said trailer and the accelerator linkage equipment upon the said tractor was not in good working order and adjustment and at a time when the said tractor and trailer were not in such safe

mechanical condition so as not to endanger other persons upon the highway, and Contract Carriers, Inc. thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2301 "No person shall drive or move on any highway any motor vehicle, trailer, semitrailer or pole trailer, or any combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this act and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupants or any person upon the highway."

4. The cross-defendant National Lead Company was concurrently careless and negligent with the cross-defendant Contract Carriers, Inc. in proximately causing the said collision and the resulting damage to the cross-claimant's motor bus in the following particulars:

(a) National Lead Company was guilty of each of the acts and omissions set forth in rhetorical paragraph 3 above as charged against Contract Carriers, Inc. in that at all times mentioned herein the said Contract Carriers, [fol. 30] Inc. was acting as the agent of the said National Lead Company within the scope of the said agency.

(b) National Lead Company was careless and negligent in that the trailer being towed by Contract Carriers, Inc. constituted a dangerous article or agency when used upon the public highways in the nighttime for the reason that the said trailer was not equipped with proper clearance and identification lights and was so constructed that it was difficult to see by overtaking traffic in the nighttime because of its color and unusual skeletal construction and for the further reason that it was too heavy as loaded with lead to be pulled by the Contract Carriers, Inc. tractor at a sufficient speed to avoid impeding the normal and reasonable movement of traffic upon a four lane, divided, United States Highway, but National Lead Company as owner and bailer of the said trailer bailed and entrusted the said trailer to Contract Carriers, Inc. knowing of the aforesaid dangerous

conditions and knowing that the said trailer would be towed upon the public highways in such a manner as to endanger persons and property.

(c) National Lead Company furnished and bailed to Contract Carriers, Inc. a trailer which was not sufficiently equipped with rear lights to meet lawful standards as established by the State of Indiana and the Interstate Commerce Commission although the said National Lead Company knew or reasonably should have known that the said trailer would be operated in interstate commerce and over the highways of the State of Indiana in the nighttime.

5. The cross-defendant General Motors Corporation was also concurrently careless and negligent with the cross-defendant Contract Carriers, Inc. in proximately causing the said collision and the resulting damage to the cross-claimant's motor bus in the following particulars:

(a) General Motors Corporation was guilty of each of the acts and omissions set forth in rhetorical paragraph 4 above as charged against Contract Carriers, Inc. in that at all times mentioned herein the said Contract Carriers, Inc. was acting in the employ and as the agent of the said Gen- [fol. 31] eral Motors Corporation within the scope of the said agency.

(b) General Motors Corporation was careless and negligent in that the trailer being towed by Contract Carriers, Inc. constituted a dangerous article or agency when used upon the public highways in the nighttime for the reason that the said trailer was not equipped with proper clearance and identification lights and was so constructed that it was difficult to see by overtaking traffic in the nighttime because of its color and unusual skeletal construction and for the further reason that it was too heavy as loaded with lead to be pulled by the Contract Carriers, Inc. tractor at a sufficient speed to avoid impeding the normal and reasonable movement of traffic upon a four lane, divided, United States highway, but General Motors Corporation as bailer of the said trailer together with the defendant National Lead Company, bailed and entrusted the said trailer to Contract Carriers, Inc. knowing of the aforesaid dangerous condi-

tions and knowing that the said trailer would be towed upon the public highways in such a manner as to endanger persons and property.

(c) General Motors Corporation was further careless and negligent in the construction and design of the accelerator linkage equipment of the said tractor which was being operated by the cross-defendant Contract Carriers, Inc., which said tractor was manufactured by the said cross-defendant General Motors Corporation, and the said defective design of the said accelerator linkage equipment prevented the towing of the said National Lead Company trailer at a speed sufficient to avoid impeding the normal and reasonable movement of traffic upon United States Highway 40 at and near the scene of the said collision even though the said tractor engine otherwise had sufficient power to properly tow the said trailer.

6. By reason of the carelessness and negligence of Contract Carriers, Inc., National Lead Company, and General Motors Corporation as aforesaid as proximately causing the said collision, the motor bus owned by The Greyhound Corporation was damaged to the extent that the entire right front part of the said bus was destroyed and the frame thereof twisted and bent; that the reasonable value of the [fol. 32] said bus before the said collision was approximately Fifty Thousand Dollars ($50,000.00) but after the said collision was only approximately Twenty Thousand Dollars ($20,000.00) and that in addition to the said damage to the said bus, the cross-claimant has lost the use of the said bus, which said loss of use is continuing during the time necessary for repairs to be made.

Wherefore, the cross-claimant The Greyhound Corporation prays:

(1) That the Court order General Motors Corporation to be made a party defendant to respond to the foregoing amended cross-claim.

(2) That this cross-claimant have judgment upon this cross-claim against Contract Carriers, Inc., National Lead Company, and General Motors Corporation either individually or jointly in the amount of Thirty-Six Thousand

Dollars ($36,000.00) and costs, and cross-claimant further prays for all other proper relief.

SMITH & YARLING

BY /s/ RICHARD W. YARLING
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for Defendant
The Greyhound Corporation

[fol. 33]

EXHIBIT "E" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ in their own right,

Plaintiffs,

—vs.—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL and CONTRACT CARRIERS, INC.,

Defendants,

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

ANSWER OF DEFENDANTS, CONTRACT CARRIERS, INC. and JOSEPH L. MCCORKHILL, TO DEFENDANT, THE GREYHOUND CORPORATION'S CROSS-CLAIM

FIRST DEFENSE

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, and for their first defense to defen-

dant, The Greyhound Corporation's cross-claim, allege and say:

I.

That they are without information sufficient to form a belief as to the truth of the averments in rhetorical paragraphs (1), (3) and (4) of defendant, The Greyhound Corporation's cross-claim and therefore deny the same.

II.

That they admit the allegations in rhetorical paragraph (2).

[fol. 34]

III.

That they deny rhetorical paragraph (5) of the defendant, The Greyhound Corporation's cross-claim, except that they admit that on the 13th day of July, 1962, at approximately 1:10 A.M., the defendant, Joseph M. McCorkhill, was driving a certain GMC tractor and trailing a Trailmobile trailer, owned by National Lead Company, eastward on U. S. Highway 40 in Hendrix County, State of Indiana, in the right hand or southernmost lane of U. S. Highway 40, with the northernmost part of said vehicle approximately two feet five inches south of the center line of the two eastbound traffic lanes.

IV.

That they deny rhetorical paragraphs (6), (7) and (8) and more specifically deny sub-paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j) of rhetorical paragraph (6) and more specifically deny sub-paragraphs (a), (b) and (c) of rhetorical paragraph (7).

V.

That as to any material averments of the defendant, The Greyhound Corporation's complaint not heretofore ad-

mitted or denied, these defendants now specifically deny each and every such material averment.

WHEREFORE, these defendants pray that the defendant, The Greyhound Corporation, take nothing by way of its cross-claim and these defendants have their costs herein and all other just and proper relief in the premises.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By .....

Harry A. Wilson, Jr.

SECOND DEFENSE.

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, and for their second defense to defen- [fol. 35] dant, The Greyhound Corporation's cross-claim, allege and say:

I.

That the negligence of the driver of the defendant, The Greyhound Corporation's bus proximately caused and contributed to the defendant, Greyhound's damages.

WHEREFORE, the defendants pray that the defendant, The Greyhound Corporation, take nothing by way of its complaint.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By .....

Harry A. Wilson, Jr.

THIRD DEFENSE

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, and for their third defense to the Defendant, The Greyhounds' cross-complaint, allege and say:

I.

That Robert L. Schlagenhauf, driver of the defendant Greyhound's bus, was guilty of wanton and wilful negli-

gence, which was the proximate cause of the defendant, Greyhound's damages.

WHEREFORE, these defendants pray that the defendant, Greyhound, take nothing by way of its cross-claim and these defendants be awarded judgment for their costs and all other just and proper relief in the premises.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By .....
Harry A. Wilson, Jr.

[fol. 36]

CERTIFICATE OF SERVICE

The undersigned, Attorney for defendants, Joseph L. McCorkhill and Contract Carriers, Inc., hereby certifies that a copy of the foregoing Answer was served upon Townsend & Townsend, 403 Indiana Bldg., Indianapolis 4, Ind., Edmund Pawelec, 517 Western Saving Fund Bldg., Bread & Chestnut Streets, Philadelphia, Pa., Smith & Yarling, 129 E. Market St., Indianapolis, Ind. and Rocap, Rocap & Reese, 156 E. Market Street, Indianapolis, Ind., by depositing in the United States mail, this 13th day of November, 1962.

.....
Harry A. Wilson, Jr.

ARMSTRONG, GAUSE, HUDSON &
KIGHTLINGER
426 Fidelity Bldg
111 Monument Circle
Indianapolis, Indiana
Phone: Melrose 8-5521

[fol. 37]

EXHIBIT "F" TO PETITION

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER
SIXTH FLOOR FIDELITY BUILDING
111 MONUMENT CIRCLE
INDIANAPOLIS 4

COPY

MElrose 8-5521

January 21, 1963.

Hon. Cale J. Holder
United States District Court
Federal Building
Indianapolis, Indiana

Re: No. IP 62-C-285
John Anthony Markiewicz, et al
vs. The Greyhound Corporation, et al
Our File No. 2315

Dear Judge Holder:

At the pre-trial conference of January 8, 1963, the Court ordered the defendant, Contract Carriers, Inc., to consolidate its Second and Third Defenses of Answer to the Cross-complaint of The Greyhound Corporation. Rather than consolidate the Third Defense with the Second Defense, Contract Carriers, Inc. will abandon its Third Defense to said Cross-complaint.

The Second Defense of Contract Carriers, Inc. to the Cross-complaint of The Greyhound Corporation is to the effect that the negligence of the driver of the bus of the defendant, The Greyhound Corporation, proximately caused and contributed to the damages of the defendant, The Greyhound Corporation, and to this Contract Carriers, Inc. adds the following, to-wit:

"That the negligence of The Greyhound Corporation proximately caused and contributed to the damages it alleges in its Cross-complaint."

"The contributory negligence of The Greyhound Corporation and its driver, Robert L. Schlagenhauf, consists of all

the careless and negligent acts as set forth in rhetorical paragraph 22 a, b, c, d, e, f, g, h, i, and j of the Amended Complaint of the plaintiff, John Anthony Markiewicz. Defendant, Contract Carriers, Inc. adopts the statements contained in the letter of January 16, 1963 of counsel for said John Anthony Markiewicz as to which of said allegations of said plaintiffs' Amended Complaint relate to violations of statutory duties and which relate to violation of [fol. 38] common law duties by the defendants, The Greyhound Corporation and Robert L. Schlagenhauf.

In addition to the charges of carelessness and negligence made in the Amended Complaint of John Anthony Markiewicz against The Greyhound Corporation and its driver, Robert L. Schlagenhauf, the defendant, Contract Carriers, Inc., in further support of its Second Defense to said Cross-complaint charge and allege that the defendant, The Greyhound Corporation was careless and negligent at the time and place in question, in that:

"1. The Greyhound Corporation carelessly and negligently failed to provide, install and maintain upon or about said bus windshield washers or other cleaning equipment which was adequate to properly clean the windshield of said bus.

"2. The Greyhound Corporation carelessly and negligently required its driver, Robert L. Schlagenhauf, to meet or make a bus schedule which schedule required that said bus driver operate said Greyhound bus at a high, dangerous and reckless rate of speed and in a reckless and dangerous manner in order to make or meet the schedule set up and provided by The Greyhound Corporation for its said driver.

"3. The defendant, The Greyhound Corporation, carelessly and negligently operated, maintained and used a bus upon the public highways which did not have sufficient structural members or adequate strength built into said bus and, in particular, built into the right front of said bus to prevent said bus from crumbling and tearing asunder when said bus struck or hit a solid object, although The Greyhound Corporation well knew that said bus would be

operated over busy and crowded public highways at high rates of speed and was likely to come into contact with solid objects.

"4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation."

The above four acts or omissions of carelessness and [fol. 39] negligence to sustain the Second Defense of the defendant, Contract Carriers, Inc., to the Cross-complaint of The Greyhound Corporation, are based upon common law negligence.

Very truly yours,

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER,
/s/ ARIBERT L. YOUNG
by Aribert L. Young.

ALY:LH

cc: Townsend & Townsend, Attorneys
120 East Market Street, Indianapolis 4

Smith & Yarling
1313 First Federal Building, Indianapolis 4

Rocap, Rocap, & Reese, Attorneys
156 East Market Street, Indianapolis 4

Edward J. Erpelding, Attorney
120 East Market Street, Room 433, Indianapolis 4

[fol. 40]

In United States Court of Appeals

For the Seventh Circuit

Before

Hon. John S. Hastings, Chief Judge, Hon. Luther M. Swygert, Circuit Judge.

Original Petition for Writ of Mandamus.

No. 14403

Robert L. Schlagenhauf, Petitioner,

vs.

Hon. Cale J. Holder, United States District Judge for the Southern District of Indiana, Respondent.

Rule to Show Cause—March 19, 1963.

This matter comes before the Court on the petition of Robert L. Schlagenhauf, filed herein on March 13, 1963, for a writ of mandamus directed to the respondent, Hon. Cale J. Holder, United States District Judge, commanding him to vacate an order entered by him on February 21, 1963, for the physical and mental examinations of Robert L. Schlagenhauf; that a Rule that respondent show cause be issued; and for other relief.

On consideration whereof, It Is Ordered by the Court that respondent, Hon. Cale J. Holder, United States District Judge for the Southern District of Indiana show cause, if any there be, why a writ of mandamus should not issue as prayed for in said petition by filing in the office of the Clerk of this Court an original and nine (9) copies of his response to this Rule within twenty (20) days from this date, such response to be confined to the question of his authority to enter such an order against petitioner under Rule 35, F.R.C.P.

It Is Further Ordered by the Court that in the meantime and pending the final disposition of the said petition for

writ of mandamus by this Court, the respondent be and he hereby is stayed from enforcing compliance with his order of February 21, 1963, for the physical and mental examinations of the petitioner, Robert L. Schlagenhauf.

[fol. 41] It Is Further Ordered that the Clerk of this Court shall forthwith serve a copy of the petition, brief in support, and this order upon the respondent, Hon. Cale J. Holder, which service shall be deemed good and sufficient service thereof.

[fol. 43]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF, Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Respondent.

ANSWER OF THE RESPONDENT, THE HONORABLE CALE J. HOLDER, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA—Filed April 27, 1963

(Omitted in printing)

[fol. 49]

RESPONDENT'S EXHIBIT "1" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Jan. 24, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ,

Plaintiffs,

vs.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY,

Defendants.

ANSWER OF DEFENDANTS, CONTRACT CARRIERS, INC. AND JOSEPH L. MCCORKHILL, TO AMENDED COMPLAINT

The defendants, CONTRACT CARRIERS, INC. and JOSEPH L. MCCORKHILL, for Answer to the Amended Complaint for Damages of the plaintiffs, John Anthony Markiewicz, a minor by his father and next friend, Edward Markiewicz, and Edward Markiewicz and Jennie Markiewicz, in their own right, allege and say:

[1] These defendants admit the facts stated in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 22 and 22(a), 22(b), 22(c), 22(d), 22(e), 22(f), 22(g), 22(h), 22(i) and 22(j) of Counts I, II and III of the plaintiffs' Amended Complaint.

[2] These defendants deny the allegations contained in rhetorical paragraphs 19, 20, 23, 23(a), 23(b), 23(c), 23(d), 23(e) and 23(f), and 25 of Counts I, II and III of plaintiffs' Amended Complaint.

[fol. 50] [3] These defendants are without knowledge or sufficient information to form a belief as to the truth of the allegations contained in rhetorical paragraphs 13, 21 and 24 and all of the each and separate subparagraphs contained in rhetorical paragraph 24 of Counts I, II and III of plaintiffs' Amended Complaint, except that these defendants do admit that the plaintiff, John Anthony Markiewicz, a minor, and the plaintiff, Jennie Markiewicz, did receive personal injuries as a result of said accident of July 13, 1962, and further that the plaintiff, Edward Markiewicz, did suffer losses and damages for medical and hospital expenses that he incurred for his son, John Anthony Markiewicz, and for his wife, Jennie Markiewicz, as a consequence of said accident of July 13, 1962.

WHEREFORE, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, pray that there be a verdict and finding herein in favor of these defendants, and for all other proper relief in the premises.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER,

by /s/ ARIBERT L. YOUNG
Aribert L. Young
Attorneys for the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill.

Sixth Floor-Fidelity Building
Indianapolis 4
MElrose 8-5521

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, hereby certifies that a copy of the above and foregoing pleading was mailed to

[fol. 51]

Townsend and Townsend
Attorneys for the plaintiffs
403 Indiana Building
120 East Market Street
Indianapolis 4

and

Smith and Yarling
Attorneys for defendants, The Greyhound Corporation and Robert L. Schlagenhauf
1313 First Federal Building
Indianapolis 4

and

Rocap, Rocap & Reese
Attorneys for defendant, National Lead Company
156 East Market Street
Indianapolis 4

this 21 day of January, 1 9 6 3.

/s/ Aribert L. Young
Aribert L. Young.

[fol. 52]

RESPONDENT'S EXHIBIT "2" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Feb. 5, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

[Stamp—Received Feb. 6, 1963—Armstrong, Gause, Hudson & Kightlinger]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ in their own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants,

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

ANSWER OF DEFENDANT, NATIONAL LEAD COMPANY

The defendant, National Lead Company, for answer to Plaintiffs' Amended Complaint says:

1) This defendant is without knowledge or information sufficient to admit or deny the allegations contained in Rhetorical Paragraphs 1 and 2 of Count I; and Rhetorical Paragraph 1 of Count II, and Rhetorical Paragraphs 1 and 2 of Count III.

2) This defendant admits the allegations contained in Rhetorical Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 and 22, including sub-paragraphs a, b, c, d, e, f and g thereof, of Counts I, II and III of the Plaintiffs' Amended Complaint.

3) This defendant denies the allegations contained in Rhetorical Paragraphs 19, 20, 23, including sub-paragraphs a, b, c and d thereof, and Rhetorical Paragraph 25 of Counts I, II and III of Plaintiffs' Amended Complaint.

4) This defendant is without knowledge or sufficient information to form a belief as to the truth of allegations contained in Rhetorical Paragraphs 13, 21 and 24, including each separate sub-paragraph of Paragraph 24, of Counts I, II and III of Plaintiffs' Amended Complaint, ex- [fol. 53] cept that this defendant does admit that the plaintiffs, John Anthony Markiewicz and Jennie Markiewicz did receive personal injuries as a result of said accident, and that the plaintiff, Edward Markiewicz suffered loss for medical and hospital expenses that he incurred for his son, John Anthony Markiewicz, and for his wife, Jennie Markiewicz.

WHEREFORE, the defendant, National Lead Company, prays that there be a verdict and finding in its favor, and for all necessary and proper relief in the premises.

ROCAP, ROCAP, REESE & ROBB

By /s/ KEITH C. REESE
Attorneys for Defendant,
National Lead Company

156 East Market Street
Indianapolis, Indiana
MElrose 8-7547

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendant, National Lead Company, hereby certifies that a copy of the above Answer was sent United States Mail this 5th day of February 1963 to the following attorneys of record for the parties herein:

Townsend & Townsend
120 E. Market Street—
Room 403
Indianapolis, Indiana
Attorneys for Plaintiffs

Armstrong, Gause, Hudson
& Kightlinger
626 Fidelity Bldg.
Indianapolis 4, Indiana
Attorneys for Defendants,
Contract Carriers, Inc. and
Joseph L. McCorkhill

Smith & Yarling
1313 First Federal Bldg.
13 N. Pennsylvania Street
Indianapolis 4, Indiana
Attorneys for Defendants,
The Greyhound Corporation
and Robert L. Schlagenhauf

Mr. A. L. Payne
Lewis, Weiland, Payne &
Carvey
501 Fidelity Bldg.
Indianapolis 4, Indiana

/s/ KEITH C. REESE
Keith C. Reese

[fol. 54]

RESPONDENT'S EXHIBIT "3" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Feb. 15, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ,

Plaintiffs,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC. and NATIONAL LEAD COMPANY,

Defendants.

ANSWER OF THIRD PARTY DEFENDANT, NATIONAL LEAD CO., TO DEFENDANT GREYHOUND CORPORATION'S CROSS-CLAIM AND CROSS-CLAIM AGAINST THE GREYHOUND CORPORATION

I

ANSWER

First Defense

The third party defendant, National Lead Co., for its first defense to defendant, Greyhound Corporation's amended cross-claim says:

1. That it admits the allegations contained in rhetorical paragraph (1).

2. It denies the allegations in rhetorical paragraph (2) of the Greyhound Corporation's amended cross-claim except that it admits that on the 13th day of July, 1962, about the hour of 1:10 A.M., the cross-defendant, Contract Carriers, Inc., by and through its agent and employee Joseph L. Mc-

[fol. 55] Corkhill, was operating its certain GMC tractor towing a trail-mobile trailer owned by National Lead Co. eastward on US Highway #40 in Hendricks County, State of Indiana at a point about 1.6 miles west of Belleville, Indiana.

3. It denies the allegations contained in rhetorical paragraph (3) and sub-paragraphs (a) through (m) thereof; rhetorical paragraph (4) and sub-paragraphs (a) through (c) thereof; and rhetorical paragraph (6) of the defendant Greyhound Corporation's amended cross-claim.

4. It denies the allegations contained in rhetorical paragraph (5) and sub-paragraphs (a) through (c) thereof; except it admits that portion of sub-paragraph (a) of said rhetorical paragraph (5) which alleges that at all times mentioned herein the said Contract Carriers Inc. was acting in the employ and as the agent of the said General Motors Corporation within the scope of the said agency.

Wherefore, the third party defendant National Lead Co. prays that the defendant The Greyhound Corporation, take nothing by its amended cross-claim, and for all other relief necessary and proper in the premises.

Boyle, Priest, Elliott & Weakly

Rocap, Rocap, Reese & Robb

By .....

Attorneys for National Lead Co.

II

Second Defense

The third party defendant National Lead Co. for its second defense to defendant The Greyhound Corporation's [fol. 56] amended cross-claim says:

1. That the negligence of the driver of the defendant Greyhound Corporation's bus, the defendant Robert L. Schlagenhaut, and the defendant The Greyhound Corporation proximately caused and contributed to the damages, if any, sustained by the defendant The Greyhound Corporation.

WHEREFORE, the third party defendant National Lead Co. prays that the defendant The Greyhound Corporation, take nothing by its amended cross-claim and for all other relief necessary and proper in the premises.

BOYLE, PRIEST, ELLIOTT & WEAKLY

ROCAP, ROCAP, REESE & ROBB

By .....

Attorneys for National Lead Co.

III

CROSS-CLAIM

The third party defendant, National Lead Co. for its cross-claim against the defendant The Greyhound Corporation and Robert L. Schlagenhauf, alleges and says:

1. The cross-claimant National Lead Co. is and was at all times mentioned herein a corporation organized and existing under the laws of the state of New Jersey, with its principal place of business in the state of New York, and is and was at all such times the owner of a certain trailer known as a "Model 400 PT trail-mobile".

2. On or about July 13, 1962 said trailer was being pulled or towed behind a GMC tractor, said tractor being owned [fol. 57] by the cross-defendant Contract Carriers, Inc., and being driven for and on behalf of said Contract Carriers, Inc. by its agent, servant, and employee Joseph L. McCorkhill in an easterly direction on US Highway #40 in Hendricks County, state of Indiana. As said trailer was being so towed eastwardly and at a point on said highway about 1 and ½ miles west of Belleville, Indiana, A GMC motor bus, Model 4501, owned by the defendant The Greyhound Corporation, and being driven also eastwardly over and upon said highway US #40 by Robert L. Schlagenhauf, the agent, servant, and employee of the said Greyhound Corporation, carelessly and negligently drove said bus into the left rear and side of said trailer, damaging said trailer as hereinafter more particularly described and set out.

3. That the defendant The Greyhound Corporation acting by and through its said agent, servant, and employee and its said employee Robert L. Schlagenhauf, were guilty of carelessness and negligence in one or more of the following particulars:

(1) The Greyhound Corporation bus was operated at such a high rate of speed that the driver thereof could not stop or swerve said bus and so avoid colliding with said trailer, to wit 75 miles per hour.

(2) By failing and neglecting to see and observe the properly and well-lighted trailer which was lawfully being operated along and upon said public highway in the southern most traffic lane of said highway, in front of said bus.

(3) Failing to stop, swerve, or otherwise control said bus so as to avoid colliding with said trailer which was being properly operated along and upon said highway.

(4) By operating said bus along and upon said highway with a windshield covered with bugs, dirt, and debree which impaired the vision of the driver of said bus.

[fol. 58] (5) By failing to allow the necessary and proper distance to exist between the front of said bus and rear of said trailer at the time said bus was attempting to pass said trailer.

(6) By failing to sound a horn or give other audible signal of its intention to pass said trailer.

(7) By operating said bus over and along said public highway when the driver thereof was tired, sleepy, and for these reasons unable to safely control and operate said bus.

(8) By permitting said bus to be operated over and upon said public highway by the said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was impaired and deficient.

(9) By failing to keep a safe distance between the front of said bus and rear of said trailer as both were being driven east along and upon said highway.

4. By reason of and as the direct proximate cause of the aforesaid carelessness and negligence of the defendants The Greyhound Corporation and Robert L. Schlagenhauf, the trailer owned by National Lead Co. was damaged; that the reasonable value of said trailer immediately prior to said collision was approximately Thirty-five Thousand Dollars ($35,000.00) and that the reasonable value of said trailer immediately following said collision was Thirty-three Thousand Dollars ($33,000.00); that in addition to the said damages to said trailer, the National Lead Co. lost the use of said trailer during the time necessary for repairs to be made to the trailer, to its damage in the sum of One Thousand Dollars ($1,000.00).

[fol. 59] WHEREFORE, National Lead Co. prays for damages against the Greyhound Corporation and Robert L. Schlagenhauf in the amount of Three Thousand Dollars ($3,000.00), costs herein expended and for all other necessary and proper relief in the premises.

BOYLE, PRIEST, ELLIOTT & WEAKLY

ROCAP, ROCAP, REESE & ROBB

By /s/ KEITH C. REESE
Attorneys for National Lead Co.

ROCAP, ROCAP, REESE & ROBB
156 East Market Street
Indianapolis, Indiana

BOYLE, PRIEST, ELLIOTT & WEAKLY
705 Olive Street
Suite 1400
St. Louis 1, Missouri

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendant, National Lead Company, hereby certifies that a copy of the above Answer and Cross-Claim was sent United States Mail this 14th day of February 1963, to the following attorneys of record for the parties herein:

TOWNSEND & TOWNSEND
120 East Market Street
Room 403
Indianapolis, Indiana
Attorneys for Plaintiff

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER
626 Fidelity Building
Indianapolis 4, Indiana
Attorneys for Defendants, Contract Carriers Inc. and Joseph L. McCorkhill

SMITH & YARLING
1313 First Federal Building
13 Pennsylvania Street
Indianapolis 4, Indiana
Attorneys for Defendants, The Greyhound Corporation and Robert I. Schlagenhauf

Mr. A. L. Payne
LEWIS, WEILAND, PAYNE & CARVEY
501 Fidelity Building
Indianapolis 4, Indiana

/s/ KEITH C. REESE
Keith C. Reese

[fol. 60]

RESPONDENT'S EXHIBIT "4" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Mar. 14, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs.—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, GENERAL MOTORS CORPORATION, Defendants.

PETITION FOR PHYSICAL EXAMINATION OF DEFENDANT, ROBERT L. SCHLAGENHAUF

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill and under the provisions of Rule 35 and Rule 37 of the Rules of Civil Procedure, now respectfully petition the court for an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by competent, qualified specialists in each of the following fields:

(1) Internal medicine; (2) Opthalmology; (3) Neurology: (4) Psychiatry.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, is in controversy. Defendant, Robert L. Schlagenhauf is a named party defendant to the original complaint filed by the plaintiffs. Further, the defendant is a named party with regard to the cross-claim filed by the defendant, National Lead Company. The physical

and mental condition of the defendant, Robert L. Schlagenhauf, is further in controversy, being raised by the general answer of the defendants, Contract Carriers, Inc., and Joseph L. McCorkhill, to the plaintiffs' complaint. As [fol. 61] a part of their general answer to the plaintiffs' complaint, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have the right under the pleadings to show that the plaintiffs' damages were the sole, proximate result of the negligence of the defendant, Robert L. Schlagenhauf, in that he was not in proper physical or mental condition to operate a motorbus. Under the general denial filed by the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, to the plaintiffs' complaint, these defendants also have the right to show that the negligence of the Greyhound Corporation in allowing the defendant Schlagenhauf to operate a motorbus when he was not in proper physical or mental condition was the sole, proximate cause of the plaintiff's injuries and damages. Under either of the latter mentioned defenses the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have placed in issue the physical and mental condition of the defendant Schlagenhauf.

Further, the physical and mental condition of the defendant, Robert L. Schlagenhauf, is specifically raised by a charge of negligence in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill to the cross-claim of the defendant, Greyhound Corporation. The defendant, Greyhound Corporation, has asked for the property damage done to its bus. Under the answers filed, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have a right to show that the negligence of the defendant, Greyhound Corporation, in allowing a driver who was physically and mentally incapable of operating a motorbus was the sole, proximate cause of the damages of the defendant, Greyhound Corporation.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, can only be determined by competent experts, no one of which can examine the defen-

dant Schlagenhauf respective to all of the conditions which relate to his driving ability. These defendants respectfully request that physicians in each of the above listed catagories be appointed and in this regard would respectfully show to the court that there are competent, qualified individuals in the respective fields as follows:
[fol. 62]

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Opthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

These examinations can be performed without physical or mental suffering or embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant. The evidence sought by such examinations cannot be produced by other witnesses and is not cumulative, as inquiry into such areas is limited to those persons qualified by training, education and experience and is not a subject of knowledge to the common layman.

Further reason for a physical and mental examination of the defendant Schlagenhauf is shown by Exhibit "A", an affidavit of one of defendant Contract Carriers, Inc. and

Joseph L. McCorkhill's attorneys involving the following issues:

(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

(2) The lights of the tractor trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of the said vehicle.

(3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

Without examinations by competent, qualified physicians in each of the fields as listed above, these defendants will be without means to properly present evidence on this issue and will be unable to properly present their defense. [fol. 63] These defendants further request that the court require this examination to be performed on or before the 1st day of May, 1963, in accordance with the pre-trial entry concerning discovery previously entered in this matter. The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, make this further petition to clarify their petition filed on February 5, 1963, as additional issues and controversies involving the defendant, Robert L. Schlagenhauf, have been raised by the defendant, National Lead Company's cross-claim and by the issues raised in the general denial of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill to the plaintiffs' complaint, which allowed the introduction of evidence as to the sole, proximate cause of the accident.

Wherefore, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, respectfully pray that this court issue an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by qualified specialists in the fields of internal medicine, opthalmology, neurology

and psychiatry, at a time convenient for the physicians and the defendant, Robert L. Schlagenhauf.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

CLERK'S NOTE

"Brief in support of petition for physical and mental examination" is omitted from the record here as it appears on side folio 10, printed page 10 supra.

[fol. 65]

Respectfully submitted,

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendants, Contract Carriers, Inc. and Jossph L. McCorkhill, hereby certifies that a copy of the foregoing petition and brief in support thereof was served upon the following attorneys by depositing in the United States mail this 14th day of March, 1963.

Townsend and Townsend
403 Indiana Building,
120 E. Market
Indianapolis, Indiana
Attorneys for the plaintiffs
Markiewicz

and Smith and Yarling,
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for defendants,
The Greyhound Corp. and
Robert L. Schlagenhauf

Mr. A. L. Payne
Lewis, Weiland, Payne & Carvey
501 Fidelity Building
Indianapolis 4, Indiana

and Sheldon A. Breskow
930 Lemcke Bldg.
Indianapolis 4, Indiana

Attorneys for plaintiff, Charles Jones

Mr. Edmund Pawelec
Attorney at Law
517 Western Savings Fund Bldg.
Philadelphia 7, Pa.
Attorney for plaintiffs Markiewicz

/s/ Harry A. Wilson, Jr.
Harry A. Wilson, Jr.

Armstrong, Gause, Hudson & Kightlinger
626 Fidelity Building
111 Monument Circle
Indianapolis, Indiana
Phone: Melrose 8-5521

[fol. 66]

Exhibit "A" to Exhibit "4"

State of Indiana,
County of Marion, ss.:

Affidavit of One of Defendant's Counsel

Harry A. Wilson, Jr., being duly sworn on his oath, deposes and says:

(1) That he is a partner in the firm of Armstrong, Gause, Hudson & Kightlinger, authorized and admitted to practice before the United States Federal District Court for the Southern District of Indiana and is one of the attorneys of record for the Defendants, Contract Carriers, Inc. and Joseph L. McCorkhill.

(2) That by his own admission, the defendant, Robert L. Schlagenhauf, in his deposition taken on August 9, 1962, admitted that he saw red lights for 10 to 15 seconds prior

to a collision with a semi-tractor trailer unit and yet drove his vehicle on without reducing speed and without altering the course thereof.

(3) The only eye-witness to this accident known to this affiant, Lewis Stone, testified that immediately prior to the impact between the bus and truck that he had also been approaching the truck from the rear and that he had clearly seen the lights of the truck for a distance of three-quarters to one-half mile to the rear thereof.

(4) The defendant, Robert L. Schlagenhauf, has admitted in his deposition taken on August 9, 1962, that he was involved in a similar type rear end collision while operating a motorbus near Flatrock, Michigan; in which parties were injured prior to the collision with the semi-tractor trailer unit of the defendant, Contract Carriers, Inc.

(5) A physical examination in the four specialty fields, as set out in defendant's Contract Carriers, Inc. and Joseph L. McCorkhill, petition can be performed without pain, suffering or mental embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant and only through such examinations can the true status and condition of the mental and physical condition be ascertained.

(6) The specialties of internal medicine, opthalmology, neurology and psychiatry require extensive training and are not within the common knowledge of the average layman and thus, without examination by specialists, no one will be able to testify upon this important issue which is in controversy in this case.

Further Affiant sayeth not.

/s/ Harry A. Wilson, Jr.
Harry A. Wilson, Jr.

Subscribed and sworn to
before me this 14 day of
March, 1963.

/s/ Margaret Gordon, Notary Public
My commission expires 8-6-66.

[fol. 67]

RESPONDENT'S EXHIBIT "5" TO ANSWER

[Stamp—Received Mar. 19, 1964—Armstrong, Gause, Hudson & Kightlinger]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., NATIONAL LEAD COMPANY and GENERAL MOTORS CORPORATION, Defendants.

ENTRY FOR 15 MARCH, 1963

Honorable Carl J. Holder, Judge

This cause came before the court upon the supplemental petition of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, for an order to examine, physically and mentally, the defendant, Robert L. Schlagenhauf and the court having considered said petition and it appearing that the physical and mental examination of the defendant, Robert L. Schlagenhauf, is within the pervue of the said Rules of Civil Procedure and can be had without physical or mental embarrassment or cost to the defendant, Robert L. Schlagenhauf; that the evidence sought therein is not cumulative and cannot be had by any other means and that said motion is made in good faith on issues in controversy and is not for the purpose of delay, which said petition is hereby sustained and it is:

ORDERED, that the defendant, Robert L. Schlagenhauf, hereby submit to physical and mental examinations by the following physicians:

[fol. 68]

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Opthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

these examinations to be conducted at times convenient to the parties and by agreement of the parties, to be completed no later than the 1st day of May, 1963, at the offices of the physicians listed above and if the time for taking said examinations cannot be reached by agreement, the court will then establish a time certain for the taking of said examinations.

CALE J. HOLDER
United States District Judge

Copies to: Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Bldg., 111 Monument Circle, Indianapolis, Ind.;

Rocap, Rocap & Reese, 156 E. Market, Indianapolis, Ind.;

Townsend & Townsend, 120 E. Market, Indianapolis, Ind.

A. L. Payne, 501 Fidelity Bldg., Indianapolis, Ind.

Smith & Yarling, 1313 First Federal Bldg., Indianapolis, Ind.

Sheldon A. Broskow, 980 Lemcke Bldg., Indianapolis, Ind.

Edmund Pawelec, 517 Western Savings Fund Bldg., Philadelphia, 7, Pa.

[fol. 69]

RESPONDENT'S EXHIBIT "6" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Mar. 14, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

vs.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

PETITION FOR PHYSICAL EXAMINATION OF DEFENDANT, ROBERT L. SCHLAGENHAUF

The defendant, National Lead Company, under the provisions of Rule 35 of the Rules of Civil Procedure, respectfully petitions the Court for an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical ex-

amination by a competent, qualified specialist in the following fields:

(1) Opthalmology (2) Neurology

(3) Psychiatry (4) Internal Medicine

The physical and mental condition of the said defendant, Robert L. Schlagenhauf, is in controversy and is at issue in this action between said Robert L. Schlagenhauf, and this defendant, National Lead Company. The National Lead Company has heretofore, in this cause, filed its cross-claim against the Greyhound Corporation, and the defendant, Robert L. Schlagenhauf. Said cross-claim puts in issue and [fol. 70] alleges that said Robert L. Schlagenhauf failed to see and observe a properly and well lighted trailer owned by National Lead Company which was traveling upon a public highway directly in front of a bus driven by Robert L. Schlagenhauf. The physical and mental condition of the defendant, Robert L. Schlagenhauf, can only be determined by competent and medical experts, no one of which can examine the defendant Schlagenhauf in respect to all of the conditions which relate to his driving ability.

This defendant would respectfully show the Court that it is joined in a prior petition requesting the physical examination of Robert L. Schlagenhauf with the defendant, Contract Carriers, Inc., which petition has been granted by this honorable Court. This petition was filed by the National Lead Company naming Robert L. Schlagenhauf as a party defendant in its cross-claim, and it is for this reason that this additional petition by National Lead Company is being filed.

As stated above, Robert L. Schlagenhauf, is now a party to the National Lead Company's cross-claim, and his mental and physical abilities concerning the operation of a vehicle is an issue. This defendant respectfully requests that one physician in each of the above listed categories be appointed, and in this regard show the Court that they are competent, qualified licensed physicians in the respective fields as fol- [fol. 71] lows:

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt

(2) Opthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster

These examinations can be performed without physical or mental suffering or embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant. The evidence sought by such examinations cannot be produced by other witnesses and is not cumulative, as inquiry into such areas is limited to those persons qualified by training, education and experience and is not a subject of knowledge to the common layman.

Without examinations by a competent qualified physician in each of the fields as listed above, these defendants will be without means to properly present evidence on this issue and will be unable to properly present their defense.

WHEREFORE, the defendant, National Lead Company, moves the Court for an Order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by one qualified specialist in the fields of internal medicine, opthalmology, neurology and psychiatry, at a

[fol. 72] time convenient for the physicians and the said defendant, Robert L. Schlagenhauf.

ROCAP, ROCAP, REESE & ROBB

/s/ JOHN T. ROCAP

By /s/ for KEITH C. REESE
Attorneys for Defendant,
National Lead Company

156 E. Market Street
Indianapolis, Indiana
MElrose 8-7547

* * * * * * *

CLERK'S NOTE

"Brief in support of petition for physical and mental examination" is omitted from the record here as it appears on side folio 10, printed page 10, supra.

[fol. 74]

Respectfully Submitted,

ROCAP, ROCAP, REESE & ROBB

/s/ JOHN T. ROCAP

By /s/ for KEITH C. REESE
Attorneys for National Lead
Company

CERTIFICATE OF SERVICE

The undersigned, one of the attorney's of record for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, hereby certifies that a copy of the above and foregoing pleading was delivered to:

Townsend and Townsend
403 Indiana Building
120 E. Market Street
Indianapolis, Indiana
Attorneys for plaintiff,
Markiewicz

Smith and Yarling
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for defendants,
The Greyhound Corp. and
Robert L. Schlagenhauf

Mr. A. L. Payne
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930 Lemcke Building
Indianapolis, Indiana

Attorneys for plaintiff, Charles Jones

Mr. Edmund Pawelec
Attorney at Law
517 Western Savings Fund
Bldg.
Philadelphia 7, Pa.
Attorneys for plaintiff
Markiewicz

this 14th day of March 1963
/s/ JOHN T. ROCAP
John T. Rocap

[fol. 75]

RESPONDENT'S EXHIBIT "7" TO ANSWER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

Honorable Cale J. Holder, Judge

This cause came before the Court upon the petition of the defendant, National Lead Company, for an order to examine, physically and mentally, the defendant, Robert L. Schlagenhauf and the Court having considered said petition and it appearing that the physical and mental examination of the defendant, Robert L. Schlagenhauf, is within the pervue of the said Rules of Civil Procedure and can be had without physical or mental embarrassment or cost to the defendant, Robert L. Schlagenhauf; that the evidence sought therein is not cumulative and cannot be had by any other means and that said motion is made in good faith on issues in controversy and is not for the purpose of delay, which said petition is hereby sustained and it is:

[fol. 76] Ordered, that the defendant, Robert L. Schlagenhauf, hereby submit to physical and mental examinations by the following physicians:

(1) Internal medicine:

(a) Richard Nay

(b) A. Ebner Blatt

(2) Opthalmology:

(a) Dr. Jack I. Taube

(b) Dr. Richard M. Harding

(3) Neurology:

(a) Dr. Charles Bonsett

(b) Dr. John Russell

(c) Dr. Karl Manders

(4) Psychiatry:

(a) Dr. Leo Loughlin

(b) Dr. Dwight W. Schuster

these examinations to be conducted at times convenient to the parties and by agreement of the parties, to be completed no later than the 1st day of April, 1963, at the offices of the physicians listed above and if the time for taking said examinations cannot be reached by agreement, the Court will then establish a time certain for the taking of said examinations.

Date March 15, 1963

CALE J. HOLDER
United States District Judge

Copies to: Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Bldg. 111 Monument Circle, Indianapolis, Indiana; Rocap, Rocap, Reese & Robb, 156 E. Market Indianapolis, Ind.; Townsend and Townsend, 120 E. Market, Indianapolis, Ind.; A. L. Payne, 501 Fidelity Building, Indianapolis, Ind.; Smith & Yarling, 1313 First Federal Building, Indianapolis, Ind.; Sheldon A. Breskow, 930 Lemcke Building, Indianapolis, Ind.; Edmund Pawelec, 517 Western Savings Fund Building, Philadelphia, 7 Pennsylvania

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[fol. 77]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14103 September Term, 1962 April Session, 1963

ROBERT L. SCHLAGENHAUF, Petitioner,

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE, FOR THE SOUTHERN DISTRICT OF INDIANA, Respondent.

On Petition for Writ of Mandamus.

OPINION—July 23, 1963

Before Kiley and Swygert, Circuit Judges, and Grant, District Judge.

SWYGERT, Circuit Judge. Robert L. Schlagenhauf petitions for a writ of mandamus (28 U. S. C. § 1651(a), the All Writs Act) directed to the Honorable Cale J. Holder, district judge. The petition raises an important question respecting the scope of Rule 35, Fed. R. Civ. P.,[1] viz., whether a federal district court has the power to order a mental or physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point.[2]

[fol. 78] Because the question is fundamental, going to the court's power to require a medical examination of a defendant in a civil action, we directed the district judge to show cause why the writ should not issue. After a response to our order had been filed on behalf of the district judge and after briefs had been submitted by the parties to the litigation, oral argument was heard.

A diagrammatic description of the history of the litigation is presented in order to show how the question arises.

---

[1] Rule 35 of the Federal Rules of Civil Procedure provides: Rule 35. Physical and Mental Examination of Persons. (a) Order for examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

[2] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2220 lists many analogous situations arising in the common law, but we are here concerned with a specific application of the term "party" found in Rule 35.

Jennie Markiewicz, John Anthony Markiewicz, Edward Markiewicz (husband and father, respectively, of Jennie and John Anthony), v. The Greyhound Corporation, Robert L. Schlagenhauf, (the driver of the Greyhound bus), Contract Carriers, Inc., Joseph L. McCorkhill, (the driver of Contract Carriers' truck-tractor), National Lead Company (the owner of the trailer being pulled by Contract Carriers).	Diversity action seeking damages for the personal injuries suffered by Jennie and John Anthony Markiewicz, passengers on the Greyhound bus, and for loss of their services sustained by John Markiewicz, all resulting from bus collision with the trailer being pulled by Contract Carriers. The accident occurred July 13, 1962, on U.S. Highway 40 in Hendricks County, Indiana. Complaint was filed July 17, 1962, as amended November 8, 1962.
The Greyhound Corporation, v. Contract Carriers, Joseph L. McCorkhill, National Lead Company, v. General Motors Corporation (third party defendant).	Cross-claim for damages to Greyhound's bus.
National Lead Company, v. Greyhound Corporation, Robert L. Schlagenhauf.	Cross-claim for damages to National's trailer.

[fol. 79] After the original complaint had been amended, Greyhound answered and filed its cross-claim. Contract Carriers and McCorkhill also answered the amended complaint.

Contract Carriers and McCorkhill filed a letter, pursuant to the district court's order, setting forth the specific allegation relied on in defense of Greyhound's cross-claim. Among these allegations is:

> 4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation.

National Lead also filed its answer to the amended complaint together with an answer to Greyhound's cross-claim. One of the defenses asserted to Greyhound's cross-claim was that the negligence of the driver of the bus, Schlagenhauf, proximately caused the damages to the bus owned by Greyhound.

National Lead's cross-claim alleged "that the defendant, The Greyhound Corporation acting by and through its said agent . . . and its said employee, [Schlagenhauf] . . . were guilty of carelessness and negligence in one or more of the following particulars:

> . . . . . .
>
> (8) By permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient.

On February 5, 1963, Contract Carriers, McCorkhill, and National Lead filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to a series of mental and physical examinations. The petitions gave the following reasons for such request:

> (1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of

Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

[fol. 80] (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.

(3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

The petition further alleged that separate examinations are required by multiple experts because no one expert could examine Schlagenhauf respective to all the conditions which related to his driving ability. In all four examinations were requested.

The district court on February 21, 1963, granted the petition and ordered Schlagenhauf to submit to mental and physical examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists, despite the fact that only four examinations had been requested.

On March 14, 1963, Contract Carriers, McCorkhill, and National Lead filed supplemental petitions for examinations of Schlagenhauf. These were supplementary to the original petition allegedly because the mental and physical condition of Schlagenhauf became additionally in issue by virtue of National Lead's cross-claim filed subsequent to the petition of February 5.

On March 15, 1963, the district court issued an order (which superseded its February order) granting the supplemental petitions and ordering Schlagenhauf to appear before the nine medical experts for psychiatric and physical examinations. This court stayed the orders pending our disposition of the instant petition for writ of mandamus.

We are mindful of the stringent restrictions that have been placed on the issuance of the writ of mandamus, and its limitation to "the exceptional case where there is clear abuse of discretion or usurpation of judicial power. . . ." *Labuy* v. *Howes Leather*, 352 U. S. 249, 257 (1957).

In *Labuy*, the Supreme Court, on certiorari to the Seventh Circuit, in language that we deem pertinent to the instant petition said:

> As this Court pointed out in *Los Angeles Brush* [fol. 81] *Corp.* v. *James*, 272 U. S. 701, 706 (1927): ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him] . . . (at 256).

Certainly the writ is not to be used as a substitute for appeal. *Ex Parte Fahey*, 332 U. S. 258 (1947). It should not be availed of to correct mere error in the exercise of conceded judicial power, although it may possibly be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction." *Ward Baking Co.* v. *Holtzoff*, 164 F. 2d 34, 36 (2nd Cir. 1947). The writ will not issue to permit this court to exercise the discretion entrusted by law to the district court. *Fisher* v. *Delehart*, 250 F. 2d 265 (8th Cir. 1959); *Goldberg* v. *Hoffman*, 226 F. 2d 681 (7th Cir. 1955).

Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order, or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal, then the writ must and should be denied.

The Supreme Court in *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1 (1941), settled the question whether Rule 35 abridges substantive rights of a litigant in contravention of the limitations against such abridgment specified in the Rules Enabling Act of June 19, 1934, 28 U. S. C. § 723 b-e. The Court held that the rule comes within the ambit of the statute regulating "procedure—the judicial process for

enforcing rights and duties recognized by the substantive law. . . ."

Sibbach is important because the Court there held that Rule 35 constitutes the lawful authority necessary for the exercise of a district court's power to order mental and physical examinations of a party. Without such lawful authority, the Supreme Court had refused to recognize inherent power in federal courts to order physical examinations of the person. In *Union Pac. Ry.* v. *Botsford*, 141 [fol. 82] U. S. 250 (1891), the Court enunciated its rationale for denying inherent power:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." (at 251).
>
> • • • • • • •
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. (at 252).

Today, in a number of our states, statutes, rules of court, and in some states, decisions, provide procedural techniques for the discovery of the mental and physical condition of a party similar to that provided for in Rule 35. Numerous decisions, both state and federal, attest to

the soundness of the medical discovery provisions.[3] This type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for a mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries. This was the situation in *Sibbach*. Indeed, the cases seem to proceed on the theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" a portion of his right to claim the inviolability of his person. In the interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make [Fol. 83] difficult of proof, that which is the very basis of his action and which is particularly within his knowledge.

The fact remains, however, that Rule 35 refers to examination of a "party." It would do violence to the clear wording of the rule to hold that only certain types of parties come within its terms. Obviously those drafting the rules, the Supreme Court, which adopted them, and the Congress that tacitly approved them as discussed in *Sibbach*, were all cognizant of the fact that "party" means both plaintiffs and defendants in civil litigation.

It is well to point out that we do not believe Schlagenhauf became a "party" within the meaning of Rule 35 in so far as the present applications for examinations are concerned until the cross-claim filed by National Lead named him a party defendant (as to Contract Carrier and McCorkhill he is not yet a party). The original suit by Markiewicz, et al., although listing Schlagenhauf as a party defendant, is separate and distinct from the cross-claims filed by the various defendants in the Markiewicz suit. Moreover, Schlagenhauf did not assume the status of a party defendant vis-a-vis Contract Carriers and McCorkhill merely by their listing his name in affirmative defenses to the cross-claim against them by Greyhound. Only upon the filing of the cross-claim by National Lead

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[3] For a thorough and scholarly discussion listing statutes and cases, see 8 WIGMORE, EVIDENCE § 2220 (McNaughton rev. 1961). See also: Developments In The Law—Discovery, 74 Harv. L. Rev. 942, 1022-27 (1961).

did Schlagenhauf enter the litigation as a "party" within the ambit of Rule 35 with respect to National Lead's petition for mental and physical examinations.

Rule 35 requires that the person to be examined be a "party" and this requirement is basic to the rule's application. *Dulles* v. *Quan Yoke Fong*, 237 F. 2d 496 (9th Cir. 1956); *Fong Sik Leung* v. *Dulles*, 226 F. 2d 74 (9th Cir. 1955); *Kropp* v. *General Dynamics Corp.*, 202 F. Supp. 207 (E. D. Mich. 1962). We decline to follow the reasoning in *Dinsel* v. *Pennsylvania R.R. Co.*, 144 F. Supp. 880 (W. D. Pa. 1956), that appears to recognize inherent power in a federal court to order physical examinations of persons not parties to the pending action. Such reasoning cannot be accommodated to the language of the Supreme Court in *Botsford* and *Sibbach*. Furthermore, the very terms of Rule 35 restrict such examination to parties.

It should also be pointed out that Schlagenhauf was not a "party" to Greyhound's cross-claim merely by reason of his being an agent of Greyhound. The Supreme Court declined to adopt a proposed amendment to Rule 35 recom-[fol. 84] mended by The Advisory Committee in its Final Report of October, 1955, that would have added the phrase, "or of an agent or a person in the custody or under the legal control of a party," to the rule.[4] In view of that Court's failure to adopt the recommended amendment we decline to extend the coverage of the rule by decision so as to include agents of parties.

What confronts us then is the question of the power of the district court to order, on the application of National Lead, mental and physical examinations of petitioner who became a party defendant by virtue of National Lead's cross-claim. In this regard we must answer the rhetorical question posed in 3 Ohlingers Federal Practice (Rev. Ed.) 610—:

> Finally, in *Sibbach* v. *Wilson & Co.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by a five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that

[4] MOORE FEDERAL PRACTICE ¶ 35.01, at 2552 (Supp. 1962).

> it invades no "substantive" right within the terms of the Enabling Act, as distinguished from a right which is merely "substantial" or "important". To the suggestion that the rule offends the important right to freedom from invasion of the person the court replies that it ". . . ignores the fact that a litigant need not resort to the federal courts unless willing to comply with the rule. . . . "
>
> This does not, however, answer the point; what of the litigant who does not resort to a federal court, has no intention of resorting to it, and does not wish to resort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted from the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination.

In the sense that Rule 37 precludes the use of a contempt citation for enforcement of an order to submit to a physical examination, Congress has not consented to the forcible physical examination of litigants in federal courts. It has, however, according to *Sibbach*, consented to district court orders directing a "party" to submit to a mental or physi- [fol. 85] cal examination in actions in which his "mental or physical condition" is "in controversy," if "good cause" for such examination be shown, and Congress has consented to appropriate orders by the district court (short of contempt) in those situations where the "party" refuses to submit to an examination.

In order that a federal district court may properly exercise its power to require a mental or physical examination of a party, Rule 35 requires that the party's mental or physical condition be "in controversy." In a negligence action involving personal injuries of a plaintiff (or of a defendant who by way of counterclaim or cross-claim seeks damages for personal injuries) there is ordinarily no question about that party's mental or physical condition being in controversy. The extent and permanency of his injuries

is one of the ultimate fact issues in the case. In the situation we have here, however, where the party sought to be examined is a defendant who himself is making no claim for damages for personal injuries, the question whether his mental or physical condition is in controversy may be more difficult to decide. See *Wadlow* v. *Humberd*, 27 F. Supp. 210 (W. D. Mo. 1939).

The traditional respect for the inviolability of one's person that our society has consistently fostered—the concern for the individual's rights enunciated by the Supreme Court in the *Botsford* case, must be recognized. Mere lip service to the requirements of "in controversy" and "good cause" in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy. The rule was never intended to be used by adverse parties as a means to harass opponents with troublesome mental and physical examinations in the hope that by chance some mental or physical impairment might be discovered. While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other means of discovery or proof are less satisfactory considering the law's solicitude for a party's privacy.

[fol. 86] Here the district court had before it a situation involving a catastrophic motor vehicle accident in which several persons were seriously injured (the Markiewicz, et al. suit potentially involves some $2,000,000.00 in damage claims), and allegations that petitioner had been involved in a similar accident in the past, that petitioner had admitted seeing lights some ten to fifteen seconds prior to impact but made no effort to stop the bus, that the driver of another vehicle was able to clearly see the lights of the truck and trailer over a considerable distance, and that the only human element utilized in the operation of the Greyhound

bus involved in this accident was petitioner. In addition, National Lead alleged that petitioner's poor eyesight was a contributing factor in the accident.

We believe that the several allegations of negligence made in this case together with the additional matters brought to the attention of the district judge relating to the circumstances of the collision are so intertwined with the mental and physical condition of petitioner that that condition may be said to be in controversy in the action for damages asserted by National Lead in its cross-claim.

Although the "in controversy" requirement of Rule 35 is necessarily related to the showing of good cause required of a movant under the rule, the sufficiency of good cause to grant the motion is not restricted to a demonstration that the mental or physical condition of the adverse party is in controversy. The possibility of alternative proof available to the movant and the burden on the party sought to be examined must be balanced against the need for discovery. Furthermore, the number and kind of examinations ordered is subject to the "good cause" requirement. The number of examinations ordered should be held to the minimum necessary considering the party's right to privacy and the need for the court to have accurate information.

In summary, we conclude that a federal district court has the power under Rule 35 to require a party, whether cast in the role of plaintiff or defendant, to submit to a mental or physical examination upon compliance with the conditions of the rule; and in the case at bar that the district court acted within its power in ordering an examination under Rule 35. Petitioner's other contentions, *e.g.*, alleged abuse of discretion in ordering an excessive number of examinations, must await review on appeal from a final judgment.

The petition is denied.

No. 14103.

[fol. 87] KILEY, Circuit Judge, dissenting.

I respectfully dissent.

I agree with the majority opinion that petitioner is a "party" subject to Rule 35. I have some doubt as to whether petitioner's eyes and mentality are "in controversy" within the meaning of the rule.

But my point of departure with the majority opinion is with respect to the "good cause" requirement of the rule. In persuasive dictum in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, 297 F. 2d 921, 924 (4th Cir. 1962), Judge Sobeloff said:

> There appear to be adequate policy reasons for imposing the good cause requirement in Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate.

The dictum expresses my view.

When the original order was entered, petitioner was not a party, and was made a party only by the later cross-complaint of National Lead Company. The second order issued upon motions merely stating that petitioner was involved in a similar accident while driving a Greyhound bus, that in the instant collision the lights of the tractor-trailer unit were visible from three-fourths to one-half mile, that petitioner saw the red lights of the truck for a period of ten to fifteen seconds prior to impact, and neither reduced his speed nor altered his course; and that unless the examinations were ordered, "defendants will be without means to properly present evidence on this issue," and "no one will be able to testify upon this important issue."

No hearing was held to inquire into these statements so as to form a sound basis for subjecting petitioner to the examinations. A brief hearing might have indicated that there is an adequate alternate method of making proof of petitioner's physical and mental condition; and that the examinations sought now would not shed light on his condition at the time of the accident more than a year ago. On the other hand, the hearing might indicate substantial merit in the grounds urged for the examination order. In either event, the inquiry would establish an adequate basis for [fol. 88] exercising the court's discretion as to whether or not the order ought to issue. The record here discloses no adequate basis for discretion.

This court will issue a writ of mandamus where it finds gross error amounting to an abuse of discretion, as in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, 304 (7th Cir. 1955). In my view, on what the district court had before it, there was a gross error amounting to an abuse of discretion committed with respect to ordering the nine examinations, particularly the mental tests.

It is clear from reading Professor Wigmore that he is talking about personal injury cases in 8 WIGMORE, EVIDENCE § 2220(F) (McNaughton rev. 1961), and the need for preventing fraud through concealment of the true nature of one's injury. He quotes at length from Justice Schaefer's opinion in *People ex rel. Noren* v. *Dempsey*, 10 Ill. 2d 288, 292-95, 139 N. E. 2d 780 (1957), where the Justice is speaking about a plaintiff in a personal injury case. Justice Schaefer in that case says that a person claiming damages puts his physical condition in issue and it becomes a fact to be proved, like the fact of the impact in that case. Petitioner did not put his physical and mental condition in issue in the case at bar. These authorities do not compel denial of the writ.

It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here.

[fol. 89]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge, Hon. Robert A. Grant, District Judge.

ROBERT L. SCHLAGENHAUF, Petitioner,

No. 14103 vs.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Respondent.

On Petition for Writ of Mandamus.

JUDGMENT—July 23, 1963

This matter comes before the Court on the petition of Robert L. Schlagenhauf for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of Robert L. Schlagenhauf for a writ of mandamus be, and the same is hereby, Denied, in accordance with the opinion of this Court filed this day.

[fol. 90] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 91]

SUPREME COURT OF THE UNITED STATES

No. 569, October Term, 1963

ROBERT L. SCHLAGENHAUF, Petitioner,

vs.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana.

ORDER ALLOWING CERTIORARI—January 13, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]8

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD W. YARLING
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert L. Schlagenhauf, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 23, 1963.

OPINIONS BELOW

The District Court for the Southern District of Indiana rendered no opinion, and the opinion of the Court of Appeals for the Seventh Circuit is not yet officially reported. It is, however, printed as an Appendix to this Petition and appears in the Record at page 77.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on July 23, 1963 (R. p. 89), and copy thereof is appended to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

In a diversity suit for damages as filed by injured bus passengers in the United States District Court for the Southern District of Indiana against this petitioner and other defendants, one of the defendants filed a cross-claim for property damage against this petitioner, and the cross-claimant and two other defendants to the original action then sought under Rule 35 of the Federal Rules of Civil Procedure to require this petitioner, who was the driver of the bus in which the passenger plaintiffs were injured, to submit to physical and mental examinations by an internist, an ophthalmologist, a neurologist and a psychiatrist. The respondent judge of the District Court then ordered this petitioner to submit to physical and mental examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists, a total of nine examinations despite the fact that only four examinations had been requested. The petitioner thereupon petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus under 28 U.S.C. § 1651 (a) directed to the respondent commanding him to vacate the orders for the said examinations. The Court of Appeals by a two to one decision denied the petition. The questions presented are:

1. Whether the respondent had the power to enter a Rule 35 discovery order for physical and mental examinations of a defendant who is not himself claiming damages for personal injuries.

2. Whether the respondent abused his discretion under the provisions of Rule 35 in ordering physical and mental examinations of a defendant whose physical and mental condition was not in controversy and in the absence of a sufficient showing of good cause.

3. Whether the respondent abused his discretion in ordering nine separate physical and mental examinations of a defendant even though only four such examinations were sought by the petitioning parties.

4. Whether the order of the respondent violated the petitioner Robert L. Schlagenhauf's substantive right of privacy and his constitutional rights under the 4th, 5th and 13th Amendments of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

4th Amendment, United States Constitution

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment, United States Constitution

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

28 U.S.C § 1254 (1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

28 U.S.C. § 1651 (a):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writes, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right

of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary not withstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Rule 35 (a), Federal Rules of Civil Procedure:

"(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

STATEMENT

A diversity action involving in excess of the required jurisdictional amount was brought in the United States District Court for the Southern District of Indiana by three plaintiffs seeking damages resulting from personal injuries sustained as the result of a collision between a bus and a tractor-trailer occurring in the State of Indiana on July 13, 1962, as allegedly caused by the concurrent negligence of the defendants The Greyhound Corporation, owner of the bus; Robert

L. Schlagenhauf, the bus driver; Contract Carriers, Inc., owner of the tractor; Joseph L. McCorkhill, driver of the tractor; and National Lead Company, owner of the trailer. After the original complaint had been amended (R. pp. 15-23), answers were filed on behalf of all defendants, and the defendant The Greyhound Corporation filed its amended cross-claim for bus damage against Contract Carriers, Inc. and National Lead Company (R. pp. 24-32), and the defendant National Lead Company filed its cross-claim for trailer damage against The Greyhound Corporation and Robert L. Schlagenhauf (R. pp. 56-59). Contract Carriers, Inc. filed a letter, pursuant to the respondent's order, setting forth the specific allegations relied upon in defense of Greyhound's cross-claim including the following:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation." (R. p. 38).

Robert L. Schlagenhauf, petitioner herein, is not a party to the cross-claim in connection with which these allegations were made. The only allegation concerning petitioner's physical or mental condition in the cross-claim of National Lead Company, to which the petitioner is a party defendant, is "that the defendant, The Greyhound Corporation acting by and through its said agent . . . and its said employee, . . . were guilty

of carelessness and negligence in one or more of the following particulars:

> . . . (8) By permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient." (R. p. 58).

No similar allegations were made by the plaintiffs in their amended complaint.

On February 5, 1963, Contract Carriers, Inc., Joseph McCorkhill, and National Lead Company filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to physical and mental examinations "by a competent, qualified specialist" in each of the fields of internal medicine, ophthalmology, neurology, and psychiatry on the stated ground that "the physical and mental condition of the defendant Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc., and Joseph L. McCorkhill, to the defendant Greyhound's cross-claim" (R. pp. 8-10). The said petition further nominated two named physicians in the field of internal medicine, two in the field of ophthalmology, three in the field of neurology, and two in the field of psychiatry and asked that one physician in each such category be appointed for a total of four examinations. The only effort on the part of the moving parties to show good cause for

any of the examinations was the assertion, supported by affidavit (R. p. 14), of the following grounds:

> "(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flat rock, Michigan, while driving a motor bus for the defendant, Greyhound Corporation.
>
> (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
>
> (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course."

Neither the petition nor the affidavit showed how long ago the earlier accident had occurred nor how the bus driver was "involved", that the lights of the tractor-trailer either were visible or should have been visible to the bus driver at the distance of one-half to three-quarters mile during which distance they were visible to another driver in another vehicle travelling ahead of the bus, that the red lights admittedly seen by the bus driver for ten to fifteen seconds prior to impact were on the tractor-trailer with which the bus collided, that there is no adequate alternate method of making proof of petitioner's physical and mental condition, nor that the examinations sought now would shed light on the condition of the bus driver as it existed on July 13, 1962. No hearing was held, but the respondent on February 21, 1963, granted the petition and ordered this petitioner to submit to physical and mental examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists (R. pp. 6, 7). On March 13, 1963

the petitioner filed in the Court of Appeals his petition for writ of mandamus directed to the respondent commanding him to vacate the order of February 21, 1963 (R. pp. 1-5). On March 14, 1963 the defendants Contract Carriers, Inc. and Joseph L. McCorkill by one petition (R. pp. 60-66) and the defendant National Lead Company in a separate petition (R. pp. 69-76) again asked for the same physical and mental examinations of Robert L. Schlagenhauf, and the new petitions were termed "supplementary" to the original petition allegedly because the physicial and mental condition of Robert L. Schlagenhauf had become additionally in issue by virtue of the National Lead Company cross-claim which was filed subsequent to the filing of the original joint petition. There was no additional effort to show good cause for the granting of the requested order and no affidavit was filed in support of the new National Lead Company petition. On March 15, 1963 the respondent entered orders sustaining the amended or supplemental petitions and requiring that Robert L. Schlagenhauf submit to physical and mental examinations by the same nine physicians named in the original order of February 21, 1963 (R. pp. 67-68 and 75, 76). The orders of March 15, 1963 were substantially identical to the original order except that the order issued upon the new petition of the defendants Contract Carriers, Inc. and Joseph L. McCorkhill required compliance by May 1, 1963 while the order issued upon the new petition of the defendant National Lead Company required compliance by April 1, 1963. The Court of Appeals stayed the orders pending disposition of the petition for writ of mandamus and has now again stayed proceedings pending the filing and disposition of this petition for writ of certiorari. The Court of Appeals entered a rule against

the respondent to show cause why a writ of mandamus should not be issued (R. pp. 40, 41), and the respondent filed his answer on April 27, 1963 (R. pp. 42-47). On July 23, 1963 the Court of Appeals rendered an opinion (R. pp. 77-88) and entered judgment (R. p. 89) denying the petition for writ of mandamus by a two to one decision, Circuit Judge Swygert and District Judge Grant constituting the majority and Circuit Judge Kiley dissenting with opinion. The Court of Appeals applied the principles relating to the issuance of a writ of mandamus as stated in *Labuy* v. *Howes Leather*, 352 U.S. 249, 257 (1957) and properly asserted at the outset that the writ of mandamus should be denied "Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal." The Court then concluded that Rule 35 applies to a party defendant as well as to a party plaintiff, that this petitioner is a party as to National Lead Company only and is still not a party as to Contract Carriers, Inc. and Joseph L. McCorkhill, that the respondent had the power under Rule 35 as declared procedural and therefore valid in *Sibbach* v. *Wilson & Company*, 312 U.S. 1 (1941) to order physical and mental examinations of a party defendant if such party's physical and mental condition is in controversy and if good cause is shown, and that although it is difficult to determine whether the mental and physical condition of a party defendant who himself is making no claim for damages for personal injuries is in controversy, such condition of the petitioner Robert L. Schlagenhauf may be said to be in controversy in the action for damages asserted by Na-

tional Lead Company in its cross-claim. Finally and in summary the Court of Appeals concluded that the respondent acted within his power in ordering an examination under Rule 35 and that the alleged abuse of discretion in exercising the power must await review on appeal from a final judgment. Judge Kiley in his dissenting opinion agreed that the petitioner is a "party" subject to Rule 35 as to National Lead Company but expressed doubt as to whether petitioner's physical and mental condition is "in controversy" within the meaning of the rule and concluded that in any event good cause as required by Rule 35 was not sufficiently shown to justify the ordering of the nine examinations, particularly the mental tests, and that therefore respondent committed gross error amounting to an abuse of discretion which justified the issuance of a writ of mandamus.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision below should be reviewed because the Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been but should be settled by this Court and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

1. The Court of Appeals has itself recognized the importance of the questions involved and has affirmed the fact that there has heretofore been no prior decision in point as stated in the opening paragraph of the majority opinion:

> "Robert L. Schlagenhauf petitions for a writ of mandamus (28 U.S.C. § 1651 (a), the All Writs Act) directed to the Honorable Cale J. Holder, district judge. The petition raises an important

> question respecting the scope of Rule 33, Fed. R. Civ. P., viz, whether a federal district court has the power to order a mental or physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point."

2. Although the Court of Appeals has concluded that the respondent did have the power to order the physical and mental examination of the petitioner upon the authority of this Court's decision in the *Sibbach* v. *Wilson & Co.* case (*supra*), it is submitted that the *Sibbach* decision only stands for the proposition that Rule 35 is procedural and invades no substantive right within the terms of the Enabling Act (former 28 U.S.C. § 723 b-c, now 28 U.S.C. § 2072) when applied to plaintiffs or other parties who voluntarily resort to the federal courts and thereby "waive" a portion of their rights to claim the inviolability of their persons. The *Sibbach* decision does not determine the validity of an attempt to use Rule 35 to force a defendant who becomes a party in a federal court against his will and who does not himself make a claim for damages for personal injuries to suffer invasion of his person in the form of physical and/or mental examinations. Neither the Court of Appeals in its opinion nor this Court has answered the rhetorical question posed at 3 Ohlingers Federal Practice (Rev. Ed.) 610 as quoted in the subject opinion (R. p. 84):

> "Finally, in *Sibbach* v. *Wilson & Co.* (1941), 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by a five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that it invades no "substantive" right within the terms of the Enabling Act, as distinguished from a right which is merely "substantial" or "important". To the suggestion that the rule offends the important right to free-

> dom from invasion of the person the Court replies that it ". . . ignores the fact that a litigant need not resort to the federal courts unless willing to comply with the rule . . ."
>
> This does not, however, answer the point; what of the litigant who does not resort to a federal court has no intention of resorting to it, and does not wish to resort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted by the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination."

If Rule 35 does not constitute lawful authority to require physical and mental examinations of a defendant as is respectfully contended by this petitioner, no such authority therefor exists, and this Court has refused to recognize any inherent power in federal courts to order such examinations of the person (*Union Pacific Ry.* v. *Botsford,* 141 U.S. 250 (1891).

3. Even if Rule 35 should be held to constitute lawful authority for the kind of examinations complained of, the power to order them exists only upon compliance with the conditions of the rule as properly stated by the Court of Appeals (R. p. 86). Such Rule expressly applies only to a "party" whose physical or mental condition is "in controversy" and then only if "good cause" is shown.

(a) "Party"—This petitioner was not a "party" within the meaning of Rule 35 as to either Contract Carriers, Inc., Joseph McCorkhill or National Lead Company at the time the original petition for Rule 35 discovery was filed, and he is not yet a party as to either Contract Carriers, Inc. or Joseph L. McCork-

hill (See majority opinion below, R. p. 83). The order of March 15, 1963, therefore, as granted upon the supplementary petition of Contract Carriers, Inc. and Joseph L. McCorkhill, was beyond the power of the respondent notwithstanding the validity or nonvalidity of the additional order of March 15, 1963 as granted upon the unverified second petition of National Lead Company which party by that date had made the petitioner a party defendant to the National Lead Company cross-claim for property damage.

(b) "In Controversy"—The personal injury plaintiffs in their amended complaint did not charge this petitioner with any physical or mental condition contributing to cause the collision involved and have not requested either physical or mental examinations of the petitioner. Aside from the allegations of Contract Carriers, Inc. and Joseph L. McCorkhill in defense of the property damage cross-claim of The Greyhound Corporation, to which this petitioner is not a party, the only pleading allegation concerning the petitioner's physical or mental condition on the date of the accident is that contained in the National Lead Company property damage cross-claim to the effect that this petitioner's vision was defective (R. p. 58). Thus the physical or mental conditions which fall within the medical specialities of internal medicine, neurology or psychiatry clearly should not have been considered "in controversy." It is particularly apparent that the mental condition of the petitioner may not be considered to be "in controversy", and it is suggested that the ordering of psychiatric examinations of the petitioner constitutes a wholly unwarranted invasion of petitioner's right of privacy inasmuch as the conduct of such examinations would necessarily subject the petitioner to the most intimate of inquiries and dis-

closures involving not only himself but all members of his family. No court in any reported case arising under the Federal Rules of Civil Procedure has ever granted an order requiring even an eye examination of a defendant driver in a tort action and certainly never nine examinations in the several medical specialties involved here. As stated in *Wadlow* v. *Humberd*, 27 F. Supp. 210, 212 (W. D. Mo. 1939), "Obviously the Rule (35) looks to a situation in which the mental or physical condition of a party shall be immediately and directly in controversy and not merely in controversy, incidentally or collaterally." It is submitted that the physical and mental condition of the petitioner is not immediately and directly in controversy under the pleadings before the respondent below and that only the condition of the petitioner's vision is even incidentally or collaterally in controversy.

(c) "Good cause"—The requirement that good cause be shown before a Rule 35 order may be entered is expressed mandatorily, and as stated in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, 297 F. 2d 921, 924 (4th Cir. 1962), "Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate." In the important matter of showing good cause for the multiple examinations of this petitioner, National Lead Company concluded in its petition upon which the respondent's order of March 15, 1963 was entered only that it could not "properly present" its defense without the four physical and mental examinations asked for (R. p. 71), and good cause was not mentioned in either the National Lead Company petition or the respondent's order. Even the original petition of National Lead Company

as filed jointly with Contract Carriers, Inc. and Joseph L. McCorkhill was supported only by the one-page affidavit of one of the attorneys for Contract Carriers, Inc. averring that the petitioner bus driver had had a prior accident and that another driver on the highway had been able to see the lights upon the tractor-trailer with which the bus driven by the petitioner collided. The respondent entered the orders on March 15, 1963 without a hearing and without inquiry beyond the petitions themselves. As stated by Circuit Judge Kiley in his dissenting opinion (R. p. 88), "It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here."

4. The important nature of these issues was expressly recognized by the Court of Appeals as aforesaid, and it is evident that appeal is a wholly inadequate remedy in that the invasions of the petitioner's person and the deprivation of his liberty would necessarily have become an accomplished fact at the time of final judgment in the property damage cross-claim below unless petitioner would elect to refuse examination, thus becoming subject to the drastic penalties authorized by Rule 37 (b) (2) of the Federal Rules of Civil Procedure. It is suggested that the enforced delivering up of one's person to restraint or interference by others is far more than a technical or unimportant invasion of personal privacy and that it is indeed irreparable in that it cannot be righted or re-

tracted. As stated by this Court in *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891), "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . ." If petitioner is required to submit to all or any of the examinations now ordered, his rights under the Fourth, Fifth and Thirteenth Amendments to the United States Constitution will have been thereby irretrievably violated, and the effect of the decision below, if unreversed, can be expected to similarly deprive defendant drivers in other tort actions of their constitutional rights.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this case is a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction and that this petition for writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

No. 14103

Before HON. ROGER J. KILEY, *Circuit Judge*, HON. LUTHER M. SWYGERT, *Circuit Judge*, HON. ROBERT A. GRANT, *District Judge*.

ROBERT L. SCHLAGENHAUF,
Petitioner,

vs.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA,
Respondent.

On Petition for Writ of Mandamus.

Tuesday, July 23, 1963

This matter comes before the Court on the petition of Robert L. Schlagenhauf for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of Robert L. Schlagenhauf for a writ of mandamus be, and the same is hereby, DENIED, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14103

SEPTEMBER TERM, 1962 APRIL SESSION, 1963

ROBERT L. SCHLAGENHAUF,
Petitioner,

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA,
Respondent.

On Petition for Writ of Mandamus.

July 23, 1963

Before KILEY and SWYGERT, *Circuit Judges,* and GRANT, *District Judge.*

SWYGERT, *Circuit Judge.* Robert L. Schlagenhauf petitions for a writ of mandamus (28 U. S. C. § 1651(a), the All Writs Act) directed to the Honorable Cale J. Holder, district judge. The petition raises an important question respecting the scope of Rule 35, Fed. R. Civ. P.,[1] viz,

[1] Rule 35 of the Federal Rules of Civil Procedure provides: Rule 35. Physical and Mental Examination of Persons. (a) Order for examination. In an action in which the mental or physical condiction of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

whether a federal district court has the power to order a mental or physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point.[2]

Because the question is fundamental, going to the court's power to require a medical examination of a defendant in a civil action, we directed the district judge to show cause why the writ should not issue. After a response to our order had been filed on behalf of the district judge and after briefs had been submitted by the parties to the litigation, oral argument was heard.

A diagrammatic description of the history of the litigation is presented in order to show how the question arises.

Jennie Markiewicz, John Anthony Markiewicz, Edward Markiewicz (husband and father, respectively, of Jennie and John Anthony), v. The Greyhound Corporation, Robert L. Schlagenhauf, (the driver of the Greyhound bus), Contract Carriers, Inc., Joseph L. McCorkhill, (the driver of Contract Carriers' truck-tractor), National Lead Company (the owner of the trailer being pulled by Contract Carriers).	Diversity action seeking damages for the personal injuries suffered by Jennie and John Anthony Markiewicz, passengers on the Greyhound bus, and for loss of their services sustained by John Markiewicz, all resulting from bus collision with the trailer being pulled by Contract Carriers. The accident occurred July 13, 1962, on U.S. Highway 40 in Hendricks County, Indiana. Complaint was filed July 17, 1962, as amended November 8, 1962.

[2] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2220 lists many analogous situations arising in the common law, but we are here concerned with a specific application of the term "party" found in Rule 35.

The Greyhound Corporation, v. Contract Carriers, Joseph L. McCorkhill, National Lead Company, v. General Motors Corporation (third party defendant).	Cross-claim for damages to Greyhound's bus.
National Lead Company, v. Greyhound Corporation, Robert L. Schlagenhauf.	Cross-claim for damages to National's trailer.

After the original complaint had been amended, Greyhound answered and filed its cross-claim. Contract Carriers and McCorkhill also answered the amended complaint.

Contract Carriers and McCorkhill filed a letter, pursuant to the district court's order, setting forth the specific allegations relied on in defense of Greyhound's cross-claim. Among these allegations is:

> 4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation.

National Lead also filed its answer to the amended complaint together with an answer to Greyhound's cross-claim. One of the defenses asserted to Greyhound's cross-claim was that the negligence of the driver of the bus, Schlagenhauf, proximately caused the damages to the bus owned by Greyhound.

National Lead's cross-claim alleged "that the defendant, The Greyhound Corporation acting by and through

its said agent . . . and its said employee, [Schlagenhauf] . . . were guilty of carelessness and negligence in one or more of the following particulars:

> (8) By permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient.

On February 5, 1963, Contract Carriers, McCorkhill, and National Lead filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to a series of mental and physical examinations. The petitions gave the following reasons for such request:

> (1) The defendent, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.
>
> (2) The lights of the tractor trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
>
> (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

The petition further alleged that separate examinations are required by multiple experts because no one expert could examine Schlagenhauf respective to all the conditions which related to his driving ability. In all four examinations were requested.

The district court on February 21, 1963, granted the petition and ordered Schlagenhauf to submit to mental and physical examinations by two named internists, two named ophthalmologists, three named neurologists and two named

psychiatrists, despite the fact that only four examinations had been requested.

On March 14, 1963, Contract Carriers, McCorkhill, and National Lead filed supplemental petitions for examinations of Schlagenhauf. These were supplementary to the original petition allegedly because the mental and physical condition of Schlagenhauf became additionally in issue by virtue of National Lead's cross-claim filed subsequent to the petition of February 5.

On March 15, 1963, the district court issued an order (which superseded its February order) granting the supplemental petitions and ordering Schlagenhauf to appear before the nine medical experts for psychiatric and physical examinations. This court stayed the orders pending our disposition of the instant petition for writ of mandamus.

We are mindful of the stringent restrictions that have been placed on the issuance of the write of mandamus, and its limitation to "the exceptional case where there is clear abuse of discretion or usurpation of judicial power. . . ." *Labuy* v. *Howes Leather*, 352 U. S. 249, 257 (1957).

In *Labuy*, the Supreme Court, on certiorari to the Seventh Circuit, in language that we deem pertinent to the instant petition said:

> As this Court pointed out in *Las Angeles Brush Corp.* v. *James*, 272 U. S. 701, 706 (1927): ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him] . . . (at 256).

Certainly the writ is not to be used as a substitute for appeal. *Ex Parte Fahey*, 332 U. S. 258 (1947). It should not be availed of to correct mere error in the exercise of conceded judicial power, although it may possibly be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction." *Ward Baking Co.* v. *Holtzoff*, 164 F. 2d 34, 36 (2nd Cir. 1947). The writ will not issue to permit this court to exercise the discretion entrusted by law to the district court. *Fisher* v. *Delehart*, 250 F. 2d 265 (8th Cir. 1957); *Goldberg* v. *Hoffman*, 226 F. 2d 681 (7th Cir. 1955).

Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order, or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal, then the writ must and should be denied.

The Supreme Court in *Sibbach* v. *Milson & Co., Inc.*, 312 U. S. 1 (1941), settled the question whether Rule 35 abridges substantive rights of a litigant in contravention of the limitations against such abridgment specified in the Rules Enabling Act of June 19, 1934, 28 U. S. C. § 723 b-c. The Court held that the rule comes within the ambit of the statute regulating "procedure—the judicial process for enforcing rights and duties recognized by the substantive law. . . ."

Sibbach is important because the Court there held that Rule 35 constitutes the lawful authority necessary for the exercise of a district court's power to order mental and physical examinations of a party. Without such lawful authority, the Supreme Court had refused to recognize inherent power in federal courts to order physical examinations of the person. In *Union Pac. Ry.* v. *Botsford*, 141 U. S. 250 (1891), the Court enunciated its rationale for denying inherent power:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." (at 251).
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> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. (at 252).

Today, in a number of our states, statutes, rules of court, and in some states, decisions, provide procedural techniques for the discovery of the mental and physical condition of a party similar to that provided for in Rule 35. Numerous decisions, both state and federal, attest to the soundness of the medical discovery provisions.[3] This type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for a mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries. This was the situation in *Sibbach*. Indeed, the cases seem to proceed on the theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" a portion of his right to claim the inviolability of his person. In the

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[3] For a thorough and scholarly discussion listing statutes and cases, see 8 WIGMORE, EVIDENCE § 2220 (McNaughton rev. 1961). See also: Developments In The Law—Discovery, 74 Harv. L. Rev. 942, 1022-27 (1961).

interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make difficult of proof, that which is the very basis of his action and which is particularly within his knowledge.

The fact remains, however, that Rule 35 refers to examination of a "party." It would do violence to the clear wording of the rule to hold that only certain types of parties come within its terms. Obviously those drafting the rules, the Supreme Court, which adopted them, and the Congress that tacitly approved them as discussed in *Sibbach*, were all cognizant of the fact that "party" means both plaintiffs and defendants in civil litigation.

It is well to point out that we do not believe Schlagenhauf became a "party" within the meaning of Rule 35 in so far as the present applications for examinations are concerned until the cross-claim filed by National Lead named him a party defendant (as to Contract Carriers and McCorkhill he is not yet a party). The original suit by Markiewicz, et al., although listing Schlagenhauf as a party defendant, is separate and distinct from the cross-claims filed by the various defendants in the Markiewicz suit. Moreover, Schlagenhauf did not assume the status of a party defendant vis-a-vis Contract Carriers and McCorkhill merely by their listing his name in affirmative defenses to the cross-claim against them by Greyhound. Only upon the filing of the cross-claim by National Lead did Schlagenhauf enter the litigation as a "party" within the ambit of Rule 35 with respect to National Lead's petition for mental and physical examinations.

Rule 35 requires that the person to be examined be a "party" and this requirement is basic to the rule's application. *Dulles* v. *Quan Yoke Fong*, 237 F. 2d 496 (9th Cir. 1956); *Fong Sik Leung* v. *Dulles*, 226 F. 2d 74 (9th Cir. 1955); *Kropp* v. *General Dynamics Corp.*, 202 F. Supp. 207 (E. D. Mich. 1962). We decline to follow the reasoning in

Dinsel v. *Pennsylvania R.R. Co.*, 144 F. Supp. 880 (W. D. Pa. 1956), that appears to recognize inherent power in a federal court to order physical examinations of persons not parties to the pending action. Such reasoning cannot be accommodated to the language of the Supreme Court in *Botsford* and *Sibbach*. Furthermore, the very terms of Rule 35 restrict such examination to parties.

It should also be pointed out that Schlagenhauf was not a "party" to Greyhound's cross-claim merely by reason of his being an agent of Greyhound. The Supreme Court declined to adopt a proposed amendment to Rule 35 recommended by The Advisory Committee in its Final Report of October, 1955, that would have added the phrase, 'or of an agent or a person in the custody or under the legal control of a party," to the rule.[4] In view of that Court's failure to adopt the recommended amendment we decline to extend the coverage of the rule by decision so as to include agents of parties.

What confronts us then is the question of the power of the district court to order, on the application of National Lead, mental and physical examinations of petitioner who became a party defendant by virtue of National Lead's cross-claim. In this regard we must answer the rhetorical question posed in 3 Ohlingers Federal Practice (Rev. Ed.) 610—:

> Finally, in *Sibbach* v. *Wilson & Co.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by a five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that it invades no "substantive" right within the terms of the Enabling Act, as distinguished from a right which is merely "substantial" or "important". To the suggestin that the rule offends the important right to freedom from invasion of the person the court replies that it ". . . ignores the fact that a litigant need not resort

[4] MOORE FEDERAL PRACTICE ¶ 35.01, at 2552 (Supp. 1962).

> to the federal courts unless willing to comply with the rule. . . ."
>
> This does not, however, answer the point; what of the litigant who does not resort to a federal court, has no intention of resorting to it, and does not wish to resort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted from the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination.

In the sense that Rule 37 precludes the use of a contempt citation for enforcement of an order to submit to a physical examination, Congress has not consented to the forcible physical examination of litigants in federal courts. It has, however, according to *Sibbach,* consented to district court orders directing a "party" to submit to a mental or physical examination in actions in which his "mental or physical condition" is "in controversy," if "good cause" for such examination be shown, and Congress has consented to appropriate orders by the district court (short of contempt) in those situations where the "party" refuses to submit to an examination.

In order that a federal district court may properly exercise its power to require a mental or physical examination of a party, Rule 35 requires that the party's mental or physical condition be "in controversy." In a negligence action involving personal injuries of a plaintiff (or of a defendant who by way of counterclaim or cross-claim seeks damages for personal injuries) there is ordinarily no question about that party's mental or physical condition being in controversy. The extent and permanency of his injuries is one of the ultimate fact issues in the case. In the situation we have here, however, where the party sought to be examined is a defendant who himself is making no claim for damages for personal injuries, the question whether his

mental or physical condition is in controversy may be more difficult to decide. See *Wadlow* v. *Humberd*, 27 F. Supp. 210 (W. D. Mo. 1939).

The traditional respect for the inviolability of one's person that our society has consistently fostered—the concern for the individual's rights enunciated by the Supreme Court in the *Botsford* case, must be recognized. Mere lip service to the requirements of "in controversy" and "good cause" in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy. The rule was never intended to be used by adverse parties as a means to harass opponents with troublesome mental and physical examinations in the hope that by chance some mental or physical impairment might be discovered. While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other means of discovery or proof are less satisfactory considering the law's solicitude for a party's privacy.

Here the district court had before it a situation involving a catastrophic motor vehicle accident in which several persons were seriously injured (the Mackiewicz, et al. suit potentially involves some $2,000,000.00 in damage claims), and allegations that petitioner had been involved in a similar accident in the past, that petitioner had admitted seeing lights some ten to fifteen seconds prior to impact but made no effort to stop the bus, that the driver of another vehicle was able to clearly see the lights of the truck and trailer over a considerable distance, and that the only human ele-

ment utilized in the operation of the Greyhound bus involved in this accident was petitioner. In addition, National Lead alleged that petitioner's poor eyesight was a contributing factor in the accident.

We believe that the several allegations of negligence made in this case together with the additional matters brought to the attention of the district judge relating to the circumstances of the collision are so intertwined with the mental and physical condition of petitioner that that condition may be said to be in controversy in the action for damages asserted by National Lead in its cross-claim.

Although the "in controversy" requirement of Rule 35 is necessarily related to the showing of good cause required of a movant under the rule, the sufficiency of good cause to grant the motion is not restricted to a demonstration that the mental or physical condition of the adverse party is in controversy. The possibility of alternative proof available to the movant and the burden on the party ought to be examined must be balanced against the need for discovery. Furthermore, the number and kind of examination ordered is subject to the "good cause" requirement. The number of examinations ordered should be held to the minimum necessary considering the party's right to privacy and the need for the court to have accurate information.

In summary, we conclude that a federal district court has the power under Rule 35 to require a party, whether cast in the role of plaintiff or defendant, to submit to a mental or physical examination upon compliance with the conditions of the rule; and in the case at bar that the district court acted within its power in ordering an examination under Rule 35. Petitioner's other contentions, *e.g.*, alleged abuse of discretion in ordering an excessive number of examinations, must await review on appeal from a final judgment.

The petition is denied.

No. 14103.

KILEY, *Circuit Judge*, dissenting.

I respectfully dissent.

I agree with the majority opinion that petitioner is a "party" subject to Rule 35. I have some doubt as to whether petitioner's eyes and mentality are "in controversy" within the meaning of the rule.

But my point of departure with the majority opinion is with respect to the "good cause" requirement of the rule.

In persuasive dictum in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, 297 F. 2d 921, 924 (4th Cir. 1962), Judge Sobeloff said:

> There appear to be adequate policy reasons for imposing the good cause requirement in Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate.

The dictum expresses my view.

When the original order was entered, petitioner was not a party, and was made a party only by the later cross-complaint of National Lead Company. The second order issued upon motions merely stating that petitioner was involved in a similar accident while driving a Greyhound bus, that in the instant collision the lights of the tractor-trailer unit were visible from three-fourths to one-half mile, that petitioner saw the red lights of the truck for a period of ten to fifteen seconds prior to impact, and neither reduced his speed nor altered his course; and that unless the examinations were ordered, "defendants will be without means to properly present evidence on this issue," and "no one will be able to testify upon this important issue."

No hearing was held to inquire into these statements so as to form a sound basis for subjecting petition to the

examinations. A brief hearing might have indicated that there is an adequate alternate method of making proof of petitioner's physical and mental condition; and that the examinations sought now would not shed light on his condition at the time of the accident more than a year ago. On the other hand, the hearing might indicate substantial merit in the grounds urged for the examination order. In either event, the inquiry would establish an adequate basis for exercising the court's discretion as to whether or not the order ought to issue. The record here discloses no adequate basis for discretion.

This court will issue a writ of mandamus where it finds gross error amounting to an abuse of discretion, as in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, 304 (7th Cir. 1955). In my view, on what the district court had before it, there was a gross error amounting to an abuse of discretion committed with respect to ordering the nine examinations, particularly the mental tests.

It is clear from reading Professor Wigmore that he is talking about personal injury cases in 8 WIGMORE, EVIDENCE § 2220(F) (McNaughton rev. 1961), and the need for preventing fraud through concealment of the true nature of one's injury. He quotes at length from Justice Schaefer's opinion in *People ex. rel. Noren* v. *Dempsey*, 10 Ill. 2d 288, 292-95, 139 N. E. 2d 780 (1957), where the Justice is speaking about a plaintiff in a personal injury case. Justice Schaefer in that case says that a person claiming damages puts his physical condition in issue and it becomes a fact to be proved, like the fact of the impact in that case. Petitioner did not put his physical and mental condition in issue in the case at bar. These authorities do not compel denial of the writ.

It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry estab-

lished a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

United States Supreme Court

October Term, 1963

No. 8

ROBERT L. SCHLAGENHAUF, *Petitioner*,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

United States Supreme Court

October Term, 1963

No. 569

ROBERT L. SCHLAGENHAUF, *Petitioner*,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion and the opinion of the Court of Appeals for the Seventh Circuit and the dissenting opinion has not yet been officially reported, but appears in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. In view of the subsequent order of the Respondent, are not any questions before this Court now moot?

2. Was the Petitioner, Robert L. Schlagenhauf, a party whose mental and physical condition was in controversy within the meaning of Rule 35, Federal Rules of Civil Procedure, so that the Respondent acted within his power?

3. Was there justification under the pleadings and uncontradicted, affidavit evidence justifying the exercise of the Respondent's discretion in granting the order?

4. Did the Respondent in any manner abuse his discretionary power in ordering multiple expert examinations under the facts shown here?

5. Should this Court review by certiorari a denial of the extraordinary remedy of mandamus under the facts here asserted?

FEDERAL RULES INVOLVED

Irrespective of the assertion of the Petitioner, only Rule 35(a), Federal Rules of Civil Procedure, is involved here, which Rule provides:

> "(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the Court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, condition and scope of the examination and the person or persons by whom it is to be made."

STATEMENT

The action arose out of a motor vehicle accident which occurred on July 13, 1962. On July 17, 1962 an action was commenced when Edward Markiewicz, John Anthony Markiewicz and Jennie Markiewicz filed a complaint in three paragraphs against the Greyhound Corporation, a common carrier; Robert L. Schlagenhauf, Greyhound's driver; Contract Carriers, Inc.; and Joseph L. McCorkhill, Contract Carriers' driver. On November 8, 1962 an amended complaint was filed naming National Lead Company as an additional party-defendant. The amended complaint alleges that the accident occurred on U. S. 40, which is a four-lane highway with two lanes for east bound traffic and two lanes for west bound traffic. John and Jennie Markiewicz were paying passengers on the Greyhound bus which was traveling east and which bus ran into the rear of a trailer being pulled by Contract Carriers' tractor, which was also traveling east. John and Jennie Markiewicz received personal injuries, and the complaint seeks $1,000,000.00 compensatory damages and $300,000.00 exemplary damages for John Markiewicz's personal injuries; $300,000.00 compensatory damages and $50,000.00 exemplary damages for Jennie Markiewicz's personal injuries; and $250,000.00 compensatory damages for the loss of services of John and Jennie Markiewicz, by Edward Markiewicz, father and husband, respectively, of the two injured bus passengers.

The Defendant Greyhound filed its answer to the complaints and filed a counter-claim against Contract Carriers and Joseph L. McCorkhill, its driver; National Lead, owner of the trailer which was being pulled by Contract Carriers; and General Motor Corporation, a third-party defendant. The counter-claim filed by Greyhound seeks to recover for the damage to the front of the bus, caused

when Mr. Schlagenhauf drove the bus into the rear of the trailer owned by National Lead and pulled by Contract Carriers.

The Defendants, Contract Carriers and Joseph L. McCorkhill, filed their answer in general denial to the amended complaint. The Defendants, Contract Carriers and Joseph L. McCorkhill, filed an answer in three paragraphs to Greyhound's counter-claim, the first paragraph in general denial; the second paragraph alleging that the negligence of the Defendant, Robert L. Schlagenhauf, in operating the bus was the proximate and contributing cause of the damage; the third paragraph alleging that the Defendant, Robert L. Schlagenhauf, was guilty of willful and wanton misconduct which proximately caused the damage to Greyhound's bus.

Contract Carriers and Joseph L. McCorkhill filed a letter with the Court pursuant to the Respondent's order, setting forth the specific allegations relied upon in defense of the counter-claim. Among these allegations were:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to the Greyhound Corporation."

The Defendant, National Lead, filed its answer to the amended complaint in general denial. National Lead filed its answer to Greyhound's counter-claim, the first paragraph in general denial, and also filed a counter-claim against Greyhound and Robert L. Schlagenhauf. The counter-claim alleged, among other things, that Robert L.

Schlagenhauf was operating the bus when he knew, or should have known, that his vision was impaired.

On February 5, 1963 Contract Carriers, Joseph L. McCorkhill and National Lead filed a petition seeking to require the Defendant, Robert L. Schlagenhauf, the bus driver, to submit to a series of physical examinations in an effort to find the true reason and explanation for this accident. Said petition gave the following reasons for such examination:

"(1) The Defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

(2) The lights of the tractor-trailer unit, which was struck by the bus driven by the Defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.

(3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course."

The petition further showed that multiple examinations were required by multiple experts because no one of which could examine the Defendant Schlagenhauf respective to all of the conditions which related to his driving ability. Further the petition showed the Court that without such examinations, the Defendants, Contract Carriers, Joseph L. McCorkhill and National Lead, would be without means to present evidence on this issue and would be unable to properly present their defense.

The District Court on February 21, 1962 ordered the Defendant, Mr. Schlagenhauf, to submit to physical and

mental examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists.

On March 14, 1963 Contract Carriers, Joseph L. McCorkhill and National Lead filed a supplemental petition for a physical examination of Mr. Schlagenhauf. The supplemental petition of Contract Carriers and Joseph L. McCorkhill alleges that such examinations are necessary as the physical and mental condition of Mr. Schlagenhauf is in issue by virtue of the answer of general denial to Greyhound's cross-complaint.

National Lead filed a supplemental petition for physical and mental examinations of Mr. Schlagenhauf, alleging that the physical and mental condition of Mr. Schlagenhauf is in issue by the cross-complaint filed by National Lead against Greyhound and Robert Schlagenhauf.

The District Court issued an order on March 15, 1963 granting Contract Carriers', Joseph L. McCorkhill's and National Lead's prayer for physical and mental examinations of Mr. Schlagenhauf.

The Petitioner then applied to the Court of Appeals for the Seventh Circuit for a Writ of Mandamus requiring the District Court to vacate its order of February 21, 1963 and the second order of March 15, 1963.

The Court of Appeals denied the petition.

Subsequent to the decision of the Court of Appeals, the Respondent vacated his order which was the subject of that Court's decision, and ordered the Petitioner to submit to an examination in each of four areas of medical specialties.

ARGUMENT

I.

The Questions Presented by the Petition for Certiorari are Moot

The District Court entered an order which was in the normal course the subject of review by the Circuit Court of Appeals. The Circuit Court of Appeals rendered its decision refusing to interfere with the order. While all stays were dissolved and before any petition was on file here, the District Court vacated its order which had been the subject of review by the Circuit Court of Appeals and entered a new order covering the same subject matter, ordering the Petitioner to submit in all to physical examinations by four specialists. This order which supplants all previous orders was never reviewed by the Circuit Court of Appeals. All but one question, that of the degree of multiple examinations, admittedly remain if in fact there are any questions of substance before this Court. But technically the order of the District Court which now exists is not the same order as is now being sought to be reviewed in this Court. On this theory, the controversy is clearly moot in this Court.

II.

The Decision Below is Clearly Correct

The Respondent in interpreting and applying Rule 35 did so in light of its historical development and the overall philosophy behind discovery procedures under the rules as they pertain to physical and mental examinations of parties.

The Court of Appeals' opinion is bottomed upon the obvious premise, in light of this Court's previous pronouncements, that there are no constitutional prohibitions in this area.

Irrespective of the language in *Union Pacific Railway v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734, later repudiated by implication, and relied upon heavily by the Petitioner, the case holds only to the proposition that there was no inherent power in the Federal Court to order a physical or mental examination of a party; and without statutory authority, the Federal Court could not then order such examination.

This holding was narrowed in *Camden & Suburban Ry. v. Stetson* (1900), 177 U. S. 172, 20 S. Ct. 614, 44 L. Ed. 721, when this Court held, there being present state statutory authority, that the Federal Court sitting therein could likewise enter an order for a physical examination of a party.

When Rule 35 was adopted, the gap between Botsford and Stetson was filled and the Federal Courts now had direct authority for ordering such examinations. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

There now being no constitutional inhibitions to an order compelling a party to submit to a physical examination, the only question that can remain is whether Rule 35 is broad enough to require a party-defendant to submit to such an examination under the showing here.

Wadlow v. Humberd (D.C.W.D. Mo. 1939), 27 F. Supp. 210, 1 F. R. Serv. 35a.21, Case 1, one of the early cases decided under this rule, narrowly interpreted its provi-

sion and held that it applied only to personal injury cases, and when the physical and mental condition was "immediately and directly" in controversy.

This narrow construction was seriously criticized by text writers and disapproved in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2, wherein the Court in order to achieve justice applied the rule in an action by a wife for maintenance of a child where there was a counter-claim based upon adultery and a denial of paternity, the Court holding that the child was a "party" for the purpose of the physical examination rule. It was further applied successfully in a case involving a war risk policy, *Countee v. U. S.* (C.C.A. 7th 1940), 112 F. (2d) 447, 3 F. R. Serv. 35a.5, Case 1, and in many instances familiarly known as the Chinese naturalization cases of which *Lue Chow Ken v. Brownell* (C.C.A. (2d) 1955), 220 F. (2d) 187, 21 F. R. Serv. 35a. 21, Case 1, is representative. No one can surmise in how many other types of cases the remedy under this rule has been usefully employed to achieve just results in the search for truth.

Rule 35 was adopted to enable parties to law suits to ascertain the true facts concerning the mental or physical condition of any other party if in controversy. The policy of the rule is to compel full disclosure of the true facts concerning any party's physical or mental condition, so that nothing is hidden from the fact finder. The language of the rule is clear and unambiguous. It does not limit its appliction, as the Petitioner would suggest, to a "party-plaintiff," but the rule provides for a remedy relating to a "party." The rule does not require the physical or mental condition to be specifically "in issue," but it suffices if it is "in controversy."

Essentially, Petitioner's argument in the Court below, and here, inevitably comes to the position that he is not a party, his mental or physical condition is not in controversy, and good cause was not shown.

That Robert L. Schlagenhauf is a party is unquestioned. He is a party-defendant in the principal action. He is a party-defendant to the cross-complaint filed by National Lead. He drove the Greyhound bus into the rear of a moving, lighted tractor-trailer generating all this litigation. To argue that he is not a party ignores the obvious.

Is his physical and mental condition in controversy?

The Petitioner is attempting to fragmentize the law suit. The Petition emphasizes "pleading allegations." The trial court, as well as the Court of Appeals, recognized that in fact there were pleading allegations, or the equivalent thereof that places the Petitioner's physical and mental condition actually in issue. It was alleged specifically in the cross-complaint of National Lead. Further in a letter notice required by the Respondent, it was specifically alleged in the defense of Contract Carriers, Inc. and Joseph L. McCorkhill to the complaint. The Respondent in his answer to the Petition for Mandamus insists the physical and mental condition of the Petitioner was of necessity in issue; therefore, in controversy under the answer of the co-defendants to the plaintiff's complaint.

The co-defendant always has available the defense of showing that the other co-defendant or co-defendants are solely negligent, and their acts are solely the proximate cause of the accident and injuries to the plaintiff even though not specifically pleaded.

Irrespective of the Petitioner complaining of the multiple examinations, the subsequent order to which refer-

ence has been made in Point I of the Argument, and which is the subject of the additional record brought before this Court by the Respondent; the number of examinations has been reduced more than one-half and involves examinations in recognized specialties having relevance to the possible physical and mental aberrations which could have been present and affected Petitioner's ability to see or appreciate dangers. In today's complex society, it certainly is not an abuse of discretion to order examinations in various areas of medical specialties in the search for the true facts. That the Court is not limited to ordering one examination is clearly stated in 2A, Barron and Holtzoff, FEDERAL PRACTICE & PROCEDURES, Sec. 822, P. 483 (1961):

> "* * * Such a limitation is wholly inconsistent with the realities of modern medical practice, where specialists from various branches of medicine are required. There is nothing in the rule to prevent the Court from ordering examinations by all of them."

The jurisdiction of this Court should not be invoked to review an order involving the number of physical examinations ordered which concededly is in areas of the trial court's discretion.

It being clear that the Petitioner's physical and mental condition was in controversy, this leaves only the question of whether good cause was shown to activate the remedy that Rule 35 provides.

The Court was presented with a petition which showed:

(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

(2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.

(3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

(4) Without examination by a competent qualified physician in each of the fields as listed, petitioner's co-defendants would be without means to present evidence on this issue.

(5) Without examination by a competent qualified physician in each of the fields as listed, petitioner's co-defendants would be unable to properly present their defense.

This petition was supported by an affidavit which presented these facts to the trial court.

The petition for medical examination of Defendant Schlagenhauf laid in the Court for sixteen days, and at no time did he present any counter-affidavits or present any fact contrary to those before the Respondent.

Considering the fact that this action arose out of a collision wherein Defendant Schlagenhauf drove a bus into the rear of a tractor-trailer which was visible to both himself and another witness; considering the fact that this was the second such accident on the part of Mr. Schlagenhauf; and considering the fact that this was the only way Contract Carriers, Joseph L. McCorkhill and National Lead had to obtain evidence upon the issue of Mr. Schlagenhauf's mental and physical condition and was the only way in which they could pepare their defense, good cause was surely shown.

The Petitioner introduces completely extraneous considerations by reference to a distinction between a party who is in the case voluntarily or involuntarily. If he is a party, we contend that suffices to invoke the rule. The search for truth and just results, which is the real mandate of the Federal Rules, hardly depends upon such irrelevancies as to whether or not the Petitioner was required to appear to the plaintiff's action by summons or whether he, himself, commenced the action. If he is a party and if his physical and mental condition is in controversy, he comes within the ambient of the rule.

III.

The Petitioner has Failed to Show Sufficient Facts to Warrant the Extraordinary Writ of Mandamus

Rules of Federal Procedure providing for discovery either have constitutional infirmities or they do not. This Court has held that they do not. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479. To begin at this late date to construe the clear and unambiguous language of Rule 35 so as to limit its application only to a party-plaintiff would be a step backwards. If the rule was within the power of this Court to approve in the first instance, then surely under its clear and unambiguous language it was within the power of the Respondent to apply.

In any event, if the power to order a party-defendant to submit to a physical examination under Rule 35 is present, this matter then resolves itself to the question of the trial courts exercise of discretion. This Court has uniformly announced its intention to avoid interfering with the discretionary powers of trial courts.

In *Ex Parte Fahey* (1947), 332 U. S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041, this Court held:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes."

In *Fisher v. Delehart* (C.C.A. 8th, 1959), 250 F. (2d) 265, the Court held:

> "'We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion entrusted to him by law.'"

In *Belships Co. Ltd., Skibs A/S v. The Republic of France* (C.C.A. (2d) 1950), 184 F. (2d) 119, the Court held:

> "While we have authority to issue one of the extraordinary writs prayed for in aid of our appellate jurisdiction, we have been admonished that this should be done only when necessary in extraordinary cases, and not as a means of interlocutory appeal."

The only showing by Petitioner for the extraordinary remedy of mandamus is that of personal inconvenience. In the last analysis, the Petitioner is really seeking an interlocutory appeal here, raising only the question of whether or not Respondent abused his discretion. The Petitioner has wholly failed to show wherein he will be ir-

reparably harmed by complying with Respondent's order. To paraphrase the language of the Court of Appeals in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2; if the examination shows nothing was wrong with Petitioner, he certainly was not harmed; and if the examination shows his physical or mental condition caused this tragic accident, a miscarriage of justice has been averted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERLE A. KIGHTLINGER,

HOWARD J. DETRUDE, JR.,

ARIBERT L. YOUNG,
626 Fidelity Building,
111 Monument Circle,
Indianapolis, Indiana,

KEITH C. REESE,
156 East Market Street,
Indianapolis, Indiana,
Counsel for Respondent.

INDEX To APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,

Plaintiffs.

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants.

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

No. IP 62-C-285

PETITION TO AMEND COURT ORDER AND TO ORDER DEFENDANT, ROBERT L. SCHLAGENHAUF, EXAMINED PHYSICALLY

The defendant, National Lead Company, prays that this Court modify its order heretofore entered on March 15, 1963 ordering the defendant, Robert L. Schlagenhauf, examined by nine (9) physicians, said previous order of the Court being in the words and figures as follows:

(H.I.)

the defendant, National Lead Company, prays that the Court modify this order to require said defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians:

Dr. L. Leo Loughlin, M.D.	Dr. A. Ebner Blatt, M.D.
Dr. Karl L. Manders, M.D.	Dr. Jack I. Taube, M.D.

This Court has heretofore ordered that counsel for defendant, National Lead Company, and counsel for defendant, Robert L. Schlagenhauf, and the Greyhound Corporation, to agree as to dates and times for said physical examinations; it was impossible to agree on specific dates and the defendant, National Lead Company further prays that the Court order said defendant, Robert L. Schlagenhauf to be examined by the four (4) said doctors on the dates and times as follows:

Dr. L. Leo Loughlin, M.D. Phychiatrist 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt Internist 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. Neurologist 8:30 A.M. 10/7/63	Dr. Jack I. Taube Opthalmologist 11:00 A.M. 10/10/63

The Petitioner further shows the Court that certain appointments have been made and that on September 6, 1963, the attorneys for Robert L. Schlagenhauf were advised of said times and dates; per copy of a letter which is attached hereto, and marked Exhibit "A"; but that attorneys for Schlagenhauf have advised that said appointments cannot be kept by Schlagenhauf.

WHEREFORE, Petitioner prays that this petition and all things herein contained be sustained.

ROCAP, ROCAP, REESE & ROBB,

By KEITH C. REESE,
Attorneys for Defendant.
National Lead Company.

156 E. Market Street,
Indianapolis, Indiana,
MElrose 8-7547.

EXHIBIT "A"

September 6, 1963

Smith & Yarling
Attorneys at Law
1313 First Federal Building
13 N. Pennsylvania Street
Indianapolis, Indiana

Re: John Anthony Markiewicz, bnf
Edward Markiewicz, et al

v. The Greyhound Corporation
Robert L. Schlagenhauf
Joseph L. McCorkhill
Contract Carriers, Inc. and
National Lead Company
Cause No. IP 62-C-285

Attention: Mr. Richard Yarling

Dear Dick:

Confirming our several conferences concerning physical examination of Robert L. Schlagenhauf, we wish to ad

vise that we have made the following appointments with the following doctors:

Dr. L. Leo Loughlin, M.D. psychiatrist 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt Internist 3:30 P.M. - 9/20/63
Dr. Karl L. Manders, M.D. neurologist 8:30 A.M. 10/7/63	Dr. Jack I. Taube OPTHALMOLOGIST 11:00 A.M. - 10/10/63

These doctors have advised that if the reserved time is not used by Mr. Schlagenhauf, and no other patient uses the time, that they will charge for said allotted time. We wish to advise you that if Mr. Schlagenhauf cannot keep these appointments, and there is any charge we will expect Mr. Schlagenhauf to pay same.

We are attempting to arrange other physical examinations as ordered by the Court, and will advise you when this has been accomplished.

Yours very truly,

ROCAP, ROCAP, REESE & ROBB,
KEITH C. REESE,

KCR.as
cc Mr. A. L. Young
Armstrong, Gause, Hudson &
Kightlinger, attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of said Petition has been sent this 14 day of September, 1963 to Smith & Yarling, 13 North Pennsylvania Street, Indianapolis, Indiana, Townsend and Townsend, Indiana Building, Indianapolis, Indiana, Edmund Pawelec, Western Saving Fund Building,

Philadelphia, Pennsylvania, Locke, Reynolds, Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, Sheldon Breskow, Lemcke Building, Indianapolis, Indiana, Lewis, Weiland, Payne and Carvey, Monument Circle, Indianapolis, Indiana by posting it in the United States Mail.

ROCAP, ROCAP, REESE & ROBB,
By KEITH C. REESE

ROCAP, ROCAP, REESE & ROBB
156 East Market Street
Indianapolis, Indiana

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,

Plaintiff

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., NATIONAL LEAD COMPANY,

Defendants

No. IP 62-C-285

OBJECTIONS AND BRIEF OF DEFENDANT ROBERT L. SCHLAGENHAUF IN OPPOSITION TO PETITION TO ORDER PHYSICAL AND MENTAL EXAMINATIONS

The defendant Robert L. Schlagenhauf respectfully submits the following brief in opposition to the petition filed by defendant National Lead Company herein on September 16, 1963 to order this defendant to submit to physical and mental examinations by the four physicians named in the said petition, to-wit: Dr. L. Leo Loughlin, psychiatrist; Dr. Karl L. Manders, neurologist; Dr. A. Ebner Blatt, internist; and Dr. Jack I. Taube, opthalmologist:

This defendant has heretofore filed his brief in opposition to the original petitions of defendant National Lead Company and defendant Contract Carriers, Inc. for such examinations, asserting that the physical and mental condition of the defendant Robert L. Schlagenhauf is not "in controversy" herein in the sense that these words are used in Rule 35 of the Federal Rules of Civil Procedure; that good cause has not been shown for the multiple examinations prayed for by the cross-defendant; and that the ordering of such examinations, including mental examination, of a defendant driver is wholly unprecedented and beyond the authority extended by Rule 35. A review of the points and authorities set forth in the said original brief is respectfully requested. In addition to the quotation from *Union Pacific R. Co. v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 previously set forth that:

> 251 "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of

> his own person, free from all restraint or interference of others, unless by clear and unequestionable authority of law * * *."

the attention of the Court is respectfully called to the quotation respecting the requirement of the showing of good cause under Rule 35 as set forth in *Guilford National Bank of Greensboro v. Southern Ry. Co.* (4th Cir. 1962), 297 F. (2d) 921:

> 924 "There appear to be adequate policy reasons for imposing the good cause requirement of Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."

In opposition to the requirement of any examinations at all, much less four examinations including mental examination, this defendant asserts again that good cause has not been shown for such examinations, and no such cause is alleged or supplemented in the petition filed on September 16, 1963 by defendant National Lead Company. It is further respectfully pointed out to the Court that no hearing has been held to inquire into the existence of good cause, if any, and there has been no showing by the defendant National Lead Company that no adequate alternate method exists of making proof of this defendant's physical and mental condition or that examinations at this time will shed light upon this defendant's condition at the time of the accident more than a year ago.

In opposition to the particular examinations and the times thereof, objection is further made that in any event the defendant Robert L. Schlagenhauf could not appear for the examination scheduled by Dr. Leo Loughlin for Sep-

tember 24, 1963 for the reason that the presence of this defendant is required in the City of Philadephia, State of Pennsylvania, during all of the week beginning September 23, 1963 to participate actively in the defense of actions entitled Norma Pauline, Joseph Pauline, Frederick Pauline, and Catherine Pauline v. The Greyhound Corporation which are pending in the Court of Common Pleas in the said City and State, the trial of which commences on the 23d day of September, 1963 and which arise out of the same collision involved herein; and additional objection is made to examination by Dr. Karl L. Manders, a neurologist, for the reason that the said Dr. Manders has testified and is to testify for plaintiffs in many cases being defended by this defendant's attorneys and is verily believed to be prejudiced toward the said attorneys and therefore toward this defendant to the extent that this defendant could not receive a fair and impartial examination and report thereof by the said Dr. Manders.

The defendant Robert L. Schlagenhauf respectfully prays that the petition of defendant National Lead Company be denied and that any and all prior orders for the physical and mental examination of this defendant be set aside.

Respectfully submitted,

SMITH & YARLING,

By RICHARD W. YARLING,
1313 First Federal Bldg.,
Indianapolis, Indiana

Attorneys for Defendant

Robert L. Schlagenhauf.

VERIFICATION

Richard W. Yarling, being first duly sworn, deposes and says that he has read the foregoing Objections and Brief and that the statements of fact contained therein are true.

RICHARD W. YARLING

Richard W. Yarling

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, the undersigned, a Notary Public, in and for said county and state this 18th day of September, 1963.

DONALD K. TUNNELL

Notary Public

My commission expires 6-26-65

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the defendant Robert L. Schlagenhauf, certifies that copies of the foregoing Brief were forwarded by first class U. S. Mail, postage prepaid, on the 18th day of September, 1963, to Rocap, Rocap, Reese & Robb, 156 E. Market Street, Indianapolis, Indiana, attorneys for defendant National Lead Company; Townsend & Townsend, 403 Indiana Building, Indianapolis, Indiana, attorneys for plaintiffs; Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, attorneys for defendant Contract Carriers, Inc. and Joseph L. McCorkhill; and to Locke, Reynolds,

Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, attorneys for cross-defendant General Motors Corporation.

RICHARD W. YARLING
Attorney.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,
Plaintiffs,

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC.,
Defendants.

and

NATIONAL LEAD COMPANY,
Third Party Defendant.

No. IP 62-C-285

ORDER

The Defendant, National Lead Company, has filed its Petition To Amend Court Order and To Order Defendant, Robert L. Schlagenhauf, Examined Physically, which petition is in the words and figures as follows:

(H.I.)

The Court hereby grants said petition and vacates its order requiring Robert L. Schlagenhauf to be examined by

nine (9) physicians, said order being dated March 15, 1963 and the Court having read and examined said petition and being duly informed and advised in the premises now grants said petition.

The Court now orders the defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians on the dates and times indicated:

Dr. L. Leo Loughlin, M. D. 10:00 A. M. 9/24/63	Dr. A. Ebner Blatt 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. 8:30 A.M. 10/7/63	Dr. Jack I. Tabue 11:00 A.M. 10/10/63

CALE J. HOLDER
Judge, United States District Court

DATED this Sept. 18, 1963
day of September, 1963

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF,
Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana,
Respondent.

Stay Order

Upon consideration of the emergency motion for stay of proceedings and/or stay of enforcement of any and all orders of the respondent requiring the physical and mental examination of petitioner, as filed by the petitioner herein, to enable said petitioner to seek review of this Court's decision of July 23, 1963, by way of petition for writ of certiorari to the Supreme Court of the United States, and it appearing that good cause therefor exists, it is

ORDERED, that the proceedings in consolidated causes No. IP 62-C-285 and IP 62-C-308 as docketed in the United States District Court for the Southern District of Indiana shall be and hereby are stayed, including the enforcement of any and all orders of said respondent requiring petitioner to submit to physical and mental examination pending the filing and disposition of petitioner's petition for writ of certiorari to the Supreme Court of the United States for review of this Court's decision of July 23, 1963 herein.

DATED September 24, 1963.

/s/ LUTHER M. SWYGERT
Circuit Judge

A True Copy:

Teste:

KENNETH J. CARRICK

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 569

ROBERT L. SCHLAGENHAUF,
Petitioner.

v.

CALE J. HOLDER, United States Judge for the Southern District of Indiana,
Respondent.

ENTRY

Cale J. Holder, United States District Judge for the Southern District of Indiana, Respondent, hereby directs the Clerk of the United States District Court for the Southern District of Indiana to properly certify to the Supreme Court of the United States as the following portions of the record involving pertinent matters occurring in his court subsequent to the decision of the United States Court of Appeals for the Seventh Circuit and prior to the filing of the petition for a writ of certiorari herein, which proceedings occurred in a cause entitled and numbered: "John Anthony Markiewicz, a minor by his father and next friend, Edward Markiewicz and Jennie Markiewicz, in their own right, Plaintiff, v. The Greyhound Corporation, Robert L. Schlagenhauf, Joseph L. McCorkhill, and Contract Carriers, Inc., Defendants, and National Lead Company, Third Party Defendant," No. IP 62-C-285, to-wit:

Petition to Amend Court Order and to Order Defendant, Robert L. Schlagenhauf, Examined Physically, filed September 16, 1963;

Objections and Brief of Defendant Robert L. Schlagenhauf in Opposition to Petition to Order Physical and Mental Examinations, filed September 18, 1963;

Order entered by the Court ordering the physical examinations, dated September 18, 1963;

Order of the United States Court of Appeals for the Seventh Circuit entered September 24, 1963, staying proceedings.

Said portions of the record, after having been so certified, shall be delivered to the attorneys of record for the Respondent and shall be filed by them in the Supreme Court of the United States as its rules provide, a certified copy of this Entry to be attached.

DATED this 25 day of October, 1963.

CALE J. HOLDER

Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right.

v.

THE GREYHOUND CORPORATION
ROBERT L. SCHLAGENHAUF,
JOSEPH L. McCORKHILL, and
CONTRACT CARRIERS, INC.,
and
NATIONAL LEAD COMPANY,
Third Party Defendant.

No. IP 62-C-285

CLERK'S CERTIFICATE

I, Robert G. Newbold, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the foregoing is a true transcript of copies of proceedings and pleadings had and filed in the above cause, as listed and designated in the Index of this transcript.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Court at Indianapolis, Indiana, this 25 day of October, 1963.

ROBERT G. NEWBOLD, *Clerk*
United States District Court
Southern District of Indiana

By: ARTHUR J. BECK
Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 81

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, *Respondent*

On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONER

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Ave.
Washington, D. C.

DAVID A. STECKBECK
13 North Pennsylvania Street
Indianapolis, Indiana

CHARLES T. BATE
13 North Pennsylvania Street
Indianapolis, Indiana

Counsel for Petitioner

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Subject Index

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 569

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court for the Southern District of Indiana rendered no opinion. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 321 F. 2d 43.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on July 23, 1963 (R. p. 84). The petition for a writ of certiorari was filed on October 18, 1963, and granted on January 13, 1964, 84 U.S. 516. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

4th Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment, United States Constitution:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall

have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

28 U.S.C. § 1651 (a):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May; and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Rule 35 (a) Federal Rules of Civil Procedure:

"(a) Order for Examination. In an action in which the mental or physical condition of a party

is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Rule 37b(2), Federal Rules of Civil Procedure:

"*Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the

order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

QUESTIONS PRESENTED

In a diversity suit for damages as filed by injured bus passengers in the United States District Court for the Southern District of Indiana against this petitioner and other defendants, one of the defendants filed a cross-claim for property damage against this petitioner. The cross-claimant and two other defendants to the original action then sought under Rule 35 of the Federal Rules of Civil Procedure to require this petitioner, who was the driver of the bus in which the passenger plaintiffs were injured, to submit to a physical examination by a competent qualified specialist in each of the following fields: (1) internal medicine; (2) ophthalmology; (3) neurology; and (4) psychiatry (R. 7). In the request for examinations two doctors were listed as competent qualified individuals in the respective fields of internal medicine, ophthalmology, neurology and psychiatry from which four could be selected should the petition for physical examination be granted. In complete disregard of the request in the petition for the physical examination, the respondent entered an order requiring the petitioner to submit to physical and mental examinations by all nine of the specialists suggested in the petition (R. 5, 6). On March 13, 1963 a petition was filed in the United States Court of Appeals for the

Seventh Circuit for a writ of mandamus under 28 U.S.C. § 1651 (a) directed to the respondent commanding him to vacate the orders for the same examinations. The Court of Appeals by a two to one decision denied the petition. The questions presented are:

1. Whether extraordinary writ of mandamus is proper remedy to review order of respondent ordering mental and physical examinations of the defendant petitioner under Rule 35 of the Federal Rules of Civil Procedure.

2. Whether the respondent had the power to order mental and physical examinations of the defendant petitioner, under Rule 35, Federal Rules of Civil Procedure, who is not himself claiming damages for personal injury.

3. Whether the petitioner was a party whose mental and physical condition was in controversy within the meaning of Rule 35, Federal Rules of Civil Procedure.

4. Whether the respondent abused his discretion under the provisions of Rule 35 in ordering physical and mental examinations of the defendant petitioner.

5. Whether the respondent abused his discretion in ordering nine separate physical and mental examinations of a defendant.

6. Whether the order of the respondent violated the petitioner's substantive right of privacy and his constitutional rights under the 4th, 5th and 14th Amendments of the Constitution of the United States.

STATEMENT

A diversity action involving in excess of the required jurisdictional amount was brought in the United States District Court for the Southern District of Indiana by three plaintiffs seeking damages resulting from personal injuries sustained as the result of a collision be-

tween a bus and a tractor-trailer occurring in the State of Indiana on July 13, 1962. The named defendants were The Greyhound Corporation, owner of the bus; Robert L. Schlagenhauf, the bus driver; Contract Carriers, Inc., owner of the tractor; Joseph L. McCorkhill, driver of the tractor; and National Lead Company, owner of the trailer. After the original complaint had been amended (R. pp. 15-24), answers were filed on behalf of all defendants. The Greyhound Corporation filed its amended cross-claim for bus damage against Contract Carriers, Inc. and National Lead Company (R. pp. 24-34). The defendant National Lead Company filed its cross-claim for trailer damage against The Greyhound Corporation and Robert L. Schlagenhauf (R. pp. 49-53). Contract Carriers, Inc. filed a letter, pursuant to the respondent's order, setting forth the specific allegations relied upon in defense of Greyhound's cross-claim including the following:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation." (R. pp. 40).

Robert L. Schlagenhauf, petitioner herein, is not a party to the cross-claim in connection with which these allegations of Contract Carriers, Inc. were made. The only allegation concerning petitioner's physical or mental condition in the cross-claim of National Lead Company, to which the petitioner was named a party defendant, is "that the defendant, The Greyhound Corporation acting by and through its said agent . . .

and its said employee . . . were guilty of carelessness and negligence in one or more of the following particulars:

> . . . . (8) by permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient." (R. p. 52).

No similar allegations were made by the plaintiffs in their amended complaint.

On February 5, 1963, Contract Carriers, Inc., Joseph McCorkhill, and National Lead Company filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to physical and mental examinations (R. pp. 7-10) "by a competent, qualified specialist" in each of the fields of internal medicine, opthalmology, neurology, and psychiatry on the stated ground that "the physical and mental condition of the defendant Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc., and Joseph L. McCorkhill, to the defendant Greyhound's cross-claim" (R. p. 8). The said petition further nominated two named physicians in the field of internal medicine, two in the field of ophthalmology, three in the field of neurology, and two in the field of psychiatry and asked that one physician in each such category be appointed for a total of four examinations. The only effort on the part of the moving parties to

show good cause for any of the examinations was the assertion, supported by affidavit (R. p. 9), of the following grounds:

> "(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motor bus for the defendant, Greyhound Corporation.
>
> (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
>
> (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course."

Neither the petition nor the affidavit showed the date of the earlier accident, nor how the bus driver was "involved"; that the lights of the tractor-trailer either were visible or should have been visible to the bus driver at the distance of one-half to three-quarters mile during which distance they were visible to another driver in another vehicle travelling ahead of the bus; that the red lights admittedly seen by the bus driver for ten to fifteen seconds prior to impact were on the tractor-trailer with which the bus collided; that there is no adequate alternate method of making proof of petitioner's physical and mental condition, nor that the examinations sought would establish the condition of the bus driver as it existed on July 13, 1962. No hearing was held. The respondent, however, on February 21, 1963, granted the petition and ordered this petitioner to submit to physical and mental examinations by two named internists, two named ophthalmo-

logists, three named neurologists and two named psychiatrists (R. pp. 5, 6). On March 13, 1963 the petitioner filed in the Court of Appeals his petition for writ of mandamus directed to the respondent commanding him to vacate the order of February 21, 1963 (R. pp. 1-4). On March 14, 1963 the defendants Contract Carriers, Inc. and Joseph L. McCorkhill by one petition (R. pp. 55-61) and the defendant National Lead Company in a separate petition (R. pp. 64-68) again asked for the same physical and mental examinations of Robert L. Schlagenhauf, and the new petitions were termed "supplementary" to the original petition allegedly because the physical and mental condition of Robert L. Schlagenhauf had become additionally in issue by virtue of the National Lead Company cross-claim which was filed on February 15, 1963 (R. p. 49), subsequent to the filing of the original joint petition. There was no additional effort to show good cause for the granting of the requested order and no affidavit was filed in support of the March 14th new National Lead Company petition. On March 15, 1963 the respondent entered orders sustaining the amended or supplemental petitions and requiring that Robert L. Schlagenhauf submit to physical and mental examinations by the same nine physicians named in the original order of February 21, 1963 (R. pp. 62-63 and 68-70). The orders of March 15, 1963 were substantially identical to the original order except that the order issued upon the new petition of the defendants Contract Carriers, Inc. and Joseph L. McCorkhill required compliance by May 1, 1963 while the order issued upon the new petition of the defendant National Lead Company required compliance by April 1, 1963. The Court of Appeals stayed the orders pending disposition of the petition for writ of mandamus. The

Court of Appeals entered a rule against the respondent to show cause why a writ of mandamus should not be issued (R. pp. 41-42), and the respondent filed his answer on April 27, 1963 (R. p. 42). On July 23, 1963 the Court of Appeals rendered an opinion (R. pp. 70-83) and entered judgment (R. p. 84) denying the petition for writ of mandamus by a two to one decision, Circuit Judge Swygert and District Judge Grant constituting the majority and Circuit Judge Kiley dissenting with opinion. The Court concluded that Rule 35 applies to a party defendant as well as to a party plaintiff; that this petitioner is a party as to National Lead Company only and is still not a party as to Contract Carriers, Inc. and Joseph L. McCorkhill; that the respondent had the power under Rule 35 as declared procedural and therefore valid in *Sibbach* v. *Wilson & Company*, 312 U.S. 1 (1941) to order physical and mental examinations of a party defendant if such party's physical and mental condition is in controversy and if good cause is shown. In addition, although it is difficult to determine whether the mental and physical condition of a party defendant who himself is making no claim for damages for personal injuries is in controversy, such condition of the petitioner Robert L. Schlagenhauf may be said to be in controversy in the action for damages asserted by National Lead Company in its cross-claim. Finally and in summary the Court of Appeals concluded that the respondent acted within his power in ordering an examination under Rule 35, and the alleged abuse of discretion in exercising the power must await review on appeal from a final judgment. Judge Kiley in his dissenting opinion agreed that the petitioner is a "party" subject to Rule 35 as to National Lead Company but expressed doubt as to whether petitioner's physical and mental

condition is "in controversy" within the meaning of the rule. He concluded that in any event good cause as required by Rule 35 was not sufficiently shown to justify the ordering of the nine examinations, particularly the mental tests, and therefore the respondent committed gross error amounting to an abuse of discretion which justified the issuance of a writ of mandamus. On October 18, 1963 the petitioner filed a petition for certiorari with this Court which was granted on January 13, 1964 (R. p. 85).

SUMMARY OF ARGUMENT

The decision of the Circuit Court of Appeals denying the defendant petitioner's petition for a writ of mandamus, by which writ the petitioner sought to have vacated an order of the respondent, issued under Rule 35 of the Federal Rules of Civil Procedure, commanding the defendant petitioner to submit to physical and mental examinations by nine court appointed physicians, should be reversed.

I

The petitioner sought the writ of mandamus under the authority of 28 U.S.C. § 1651(a) of the All Writs Statute and the Circuit Court of Appeals had the power to issue such writ in aid of jurisdiction (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 1953). The petitioner contends that the writ of mandamus is a proper remedy where (a) the equities of the case are extraordinary (*Ward Baking* v. *Holtzoff*, 164 F. 2d 34, (2nd Cir. 1947); see also majority opinion R. p. 75); (b) action of district court is improper or beyond authority (*Labuy* v. *Howes Leather*, 352 U.S. 249 (1957)); (c) action of district court is erroneous (*Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*,

220 F. 2d 299, (7th Cir. 1955); *Atlass* v. *Miner*, 265 F. 2d 312, (7th Cir. 1959); (d) district court abused discretion (*Labuy* v. *Howes Leather, supra*); (e) to await appeal on the merits would be clearly ineffective (*Atlas* v. *Miner;* see also majority opinion R. p. 75).

The petitioner submits, as will hereinafter be shown, that the respondent did not have authority to issue the order complained of or if the court possessed such power, its issuance, under the circumstances, constitutes a clear abuse of discretion on the part of the respondent and further that the order complained of is interlocutory and not directly appealable (*Bowles* v. *Commercial Casualty Insurance Co.*, 107 F. 2d 169, (4th Cir. 1939)). Therefore the petitioner has no adequate remedy other than his prayer that a prerogative writ of mandamus issue.

II

There are no prior decisions in point wherein, under Rule 35 of the Federal Rules of Civil Procedure, a defendant in a tort action has been ordered to submit to a physical and/or mental examination. The defendant petitioner contends that the respondent did not have power to issue the order in question. There is no inherent power in federal courts to order such examinations (*Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, (1891)). The court in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), upheld the power of the court under Rule 35 to order the physical examination of a plaintiff who voluntarily resorts to the federal courts to recover for personal injuries and thereby "waives" a portion of his right to claim the inviolability of his person. The defendant petitioner, unlike the subject in *Sibbach* v. *Wilson & Co. supra*, did not resort to the

federal court. He has made no claim for personal injuries and consequently has not in any manner waived his right to the inviolability of his person as controlled and protected by the underlying considerations of personal liberties as expressed by the court in *Union Pacific R. Co.* v. *Botsford, supra.*

Therefore, the respondent issued said orders complained of without power, said order not being issued by authority of law and there being no inherent power in the district court to issue said order.

III

Rule 35 of the Federal Rules of Civil Procedure expressly applies only to a "party" whose physical or mental condition is "in controversy" and then only if "good cause" is shown. Assuming that the respondent had the power under Rule 35 to order the physical and mental examinations of the petitioner (which the petitioner denies) the respondent abused his discretion in so ordering.

A. Rule 35 expressly applies only to a party and may not be extended to persons who are not parties. (*Dulles* v. *Quan Yoke Fong,* 237 F. 2d 496 (1956); *Fong Sik Leung* v. *Dulles,* 226 F. 2d 74, (1955)).

As was stated by the Circuit Court of Appeals (see majority opinion R. p. 77): "The original suit by Markiewicz, et al, although listing Schlagenhauf as a party defendant, is separate and distinct from the cross-claims filed by the various defendants in the Markiewicz suit." "Moreover, Schlagenhauf did not assume the status of a party defendant vis-a-vis Contract Carriers and McCorkhill merely by their listing his name in affirmative defenses to the cross-claim against them by Greyhound."

At the time the original petition was filed on February 5, 1963, by Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company the petitioner was not a "party" within the meaning of Rule 35 and he is not yet a party as to either Contract Carriers, Inc. or Joseph L. McCorkhill (see majority opinion R. p. 77). Therefore, the order of February 15, 1963 (R. p. 49-54), granted upon the petition of February 5, 1963 (R. p. 7-14) and the order of March 15, 1963 (R. p. 62-63), granted upon the supplementary petition of Contract Carriers, Inc. and Joseph L. McCorkhill, were issued by the respondent without authority notwithstanding the "validity" of the additional order of March 15, 1963 (R. p. 68-70) as granted upon the unverified second petition of National Lead Company which party had by that date made the petitioner a party defendant to the National Lead Company cross-claim for property damage.

B. Another prerequisite of Rule 35 is that the physical or mental condition if the person to be examined be "in controversy". The petitioner contends "in controversy" means immediately and directly not merely in controversy, incidentally or collaterally. *Wadlow* v. *Humberd*, (1939), 27 F. Supp. 210). The plaintiffs Markiewicz have expressly placed "in controversy" their physical and mental condition by their amended complaint seeking damages for injuries allegedly permanent. The petitioner has made no claim for personal injuries. The petitioner's physical and mental condition is relevant only with reference to the moment of impact. The only pleading allegation concerning the petitioner's physical or mental condition, aside from the allegations of Contract Carriers, Inc. and Joseph L. McCorkhill in defense of the property dam-

age cross-claim of The Greyhound Corporation, to which this petitioner is not a party, is that contained in the National Lead Company property damage cross-claim to the effect that this petitioner's vision was defected (R. p. 52). The physical and mental condition of the petitioner is therefore not immediately and directly in controversy under the pleadings. Only the condition of the petitioner's vision is even incidentally or collaterally in controversy. "Mere lip service to the requirements of 'in controversy' and 'good cause' in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy." (Majority Opinion R. p. 80).

C. The invasion of the petitioner's privacy by a physical or mental examination is so serious that a strict standard of the "good cause" requirement of Rule 35, supervised by the district courts, is manifestly appropriate. (*Guilford National Bank of Greensboro v. Southern Ry. Co.*, 297 F. 2d 921, (4th Cir. 1962)). Respondent's orders of February 15, 1963 and March 15, 1963 (with respect to the petition of Contract Carriers and Joseph L. McCorkhill) were based solely upon the petitions themselves and affidavits of counsel attached thereto. No hearings were had nor inquiry made beyond the petitions. As previously argued at the time of the original order and the order of March 15, 1963 with respect to Contract Carriers, Inc. and Joseph L. McCorkhill, the petitioner was not a party. The order of the respondent of March 15, 1963 upon the petition of National Lead Company was issued solely upon the allegations contained in the petition; no affidavit was attached, no hearing was held and no inquiry was made beyond the petition. The petitioner submits an invasion of an individual's privacy by a

physical and mental examination is so serious that such right should not be transgressed until the trial court has established a reasonable basis upon which to exercise discretion under a strict standard of good cause. In the words of Circuit Judge Kiley (dissenting opinion R. p. 83): "That was not done here."

D. Rule 35(a) provides that "the order may be made only on motion for good cause shown . . .". Apart from Rule 35, the respondent could only have entered an order for physical or mental examinations if a statute of the State of Indiana authorized such an order (*Camden & Suburban Ry. Co.* v. *Stetson*, 177 U.S. 172, 1900). There is no such Indiana statute. The respondent's orders therefore ordering nine examinations was wholly unauthorized and constituted a usurption of judicial power. The respondent therein committed gross error amounting to an abuse of discretion.

IV

In the foregoing paragraphs of the summary the petitioner has set forth grounds upon which he contends that the orders entered against him by the respondent were not within the power of the respondent to issue or were issued not in conformity with Rule 35. There being no inherent power in a federal court to order such examinations of a person (*Union Pacific Ry.* v. *Botsford*, 141 U.S. 250 (1891)), and such orders not being authorized by clear and unquestionable authority of law, said orders constitute an invasion of the petitioner's person and a deprivation of his liberty and thereby violate his right of privacy as expressed in *Union Pacific Ry.* v. *Botsford* and the guarantees of the 4th, 5th and 14th Amendments to the Constitution of the United States.

V

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

ARGUMENT

I

PROPRIETY OF WRIT OF MANDAMUS TO REVIEW ORDER OF RESPONDENT

The petitioner seeks to have reversed the judgment of the Court of Appeals for the Seventh Circuit denying the petitioner's Petition for Writ of Mandamus by which writ the petitioner sought to have vacated an order by the respondent commanding the petitioner to submit to physical and mental examinations by nine court appointed physicians.

The issuance of the writ prayed for is authorized by the All Writs Statute of the Judicial Code of 1948, 28 U.S.C. § 1651(a) as follows:

> "Sec. 1651. Writs.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the wages and principles of law."

The case below is one over which the Court of Appeals for the Seventh Circuit has appellate jurisdiction, and thus the Court of Appeals had the power, if it had chosen, to issue a writ of mandamus in aid of jurisdiction. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382, 383; 98 L. ed. 106, 111, 112; 74 S. Ct. 145 (1953).

It is recognized by the petitioner that, notwithstanding the power to issue the writ, the Court must exercise its discretion either to grant or deny the petition and that a writ of mandamus is not to be used in routine matters, but is reserved for cases approaching the extraordinary (*Ward Baking* v. *Holtzoff*, 164 F. 2d 34, (2d Cir. 1947)); not to be used as a substitute for appeal. (Ex Parte Fahey, 332 U.S. 258, 1947); nor to permit the Circuit Court of Appeals to exercise the discretion entrusted by law to the district court (*Fisher* v. *Delehart*, 250 F. 2d (8th Cir. 1947)).

It is respectfully submitted, as will be hereinafter more particularly shown, that the order complained of is extraordinary, that the district court did not have power to issue said order, or if the court possessed said power, its issuance constitutes a clear abuse of discretion on the part of the respondent. That the finding of lack of authority or abuse of discretion justifies the issuance of a writ of mandamus is recognized in the following reported opinions:

> A. C.Nielsen Co. v. Hoffman, 270 F. 2d 693 (7th Cir. 1959). "We think the question we must determine is whether there was an abuse of discretion."
>
> Chicago, Rock Island and Pacific Railroad Co. v. Igoe, 220 F. 2d 299, 304 (7th Cir. 1955). Must be "so clearly erroneous as to amount to an abuse of his discretion." Cited by Circuit Judge Kiley in dissenting opinion (R. p. 83).
>
> Goldberg v. Huffman, 226 F. 2d 681 (7th Cir. 1955) "Such a writ, says the Supreme Court in State of Virginia v. Rives, 100 U.S. 313, 323, 25 L. ed. 667, 'does not lie to control judicial discretion, except when that discretion has been abused' . . . we can only act when and if it is shown that he has abused it."

The Court of Appeals in the instant case applied the principles relating to the issuance of a writ of mandamus as stated in *Labuy* v. *Howes Leather*, 352 U.S. 249 (1957):

> "As this court pointed out in Los Angeles Brush Mfg. Co. v. James, 272 U.S. 701, 706, 71 L. ed. 481, 483, 47 S. Ct. 286 (1927): '(W)here the subject concerns the enforcement of the . . . (r) rules which by law it is the duty of this court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the court '. . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain (him) . . .'."

and properly asserted at the outset that the writ of mandamus should be denied "Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal." (R. p. 75).

There is also precedent for the use of a writ of mandamus to correct an erroneous discovery order in *Atlas* v. *Miner*, 265 F. 2d 312 (7th Cir. 1959), wherein the Circuit Court of Appeals granted the writ to prevent enforcement of an order directing petitioner to submit to an oral discovery deposition since "critical issue raised at this juncture strikes at a fundamental procedure question, to await its determination until the hearing of an appeal on the merits of the case would afford a clearly inadequate remedy". In praising this decision, it has been stated at 4 Moore's Federal Practice 1748 that:

> "... Atlas authorized mandamus by emphasizing: (a) that a fundamental procedural question was involved; and (b) desire to avoid a conflict of opinion among the district judges of the circuit. It would seem that the Atlas rationale, as expressed by the circuit court may provide incentive for other appellate courts to exercise effective appellate supervision over the discovery process."

Since the order for the physical and mental examinations of the petitioner is interlocutory and not directly appealable (*Bowles v. Commercial Casualty Insurance Co.*, 107 F. 2d 169 (4th Cir. 1939)), petitioner has no adequate remedy other than his prayer that a prerogative writ of mandamus issue. No effective appellate review of discovery orders can be had, except possibly in connection with a contempt order, unless the party against whom an order for discovery has been entered wishes to take the extreme step of permitting the action to be dismissed or default entered for failure to comply with the order. While this procedure permits immediate appellate review, it obviously involves great risk; and even here the right to appeal is in effect dependent upon the consent of the district court, which can, instead of ordering dismissal or default, enter some non-appealable order, such as a stay or an order precluding introduction of certain evidence or support or defense of certain claims. See 4 Moore's Federal Practice 1775.

With default or other penalty on one side and unwarranted submission to the invasion of his person on the other, it is respectfully submitted that the issuance of a writ of mandamus is the petitioner's only effective and adequate remedy, under the extraordinary circumstances here existing.

RESPONDENT DID NOT HAVE POWER TO ORDER MENTAL AND PHYSICAL EXAMINATIONS OF THE DEFENDANT PETITIONER

The Court of Appeals has itself recognized the importance of the questions involved and has affirmed the fact that there has heretofore been no prior decision in point as stated in the opening paragraph of the majority opinion:

> "Robert L. Schlagenhauf petitions for a writ of mandamus (28 U.S.C. § 1651(a), the All Writs Act) directed to the Honorable Cale J. Holder, District Judge. The petition raises an important question respecting the scope of Rule 35, Fed. R. Civ. P., viz, whether a federal district court has the power to order a mental and physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point." (R. p. 71).

The leading case upholding the power to compel a party to submit to physical or mental examination arose in the Seventh Circuit in *Sibbach* v. *Wilson & Co.* (1941), 312 U.S. 1, 61 S. Ct. 422, 85 L. ed. 479. The Supreme Court was concerned with the fact that prior to the Federal Rules of Civil Procedure there was no inherent power in a United States District Court to order an examination as had been pronounced in *Union Pacific R. Co.* v. *Botsford*, (1891) 141 U.S. 250, 11 S. Ct. 1000, 35 L. ed. 734, in which it was said:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone'."

The Court of Appeals concluded that the respondent did have the power to order the physical and mental examination of the petitioner upon the authority of this Court's decision in the *Sibbach* v. *Wilson & Co.* case. However, it is submitted that the Sibbach decision only stands for the proposition that Rule 35 is procedural and invades no substantive right within the terms of the Enabling Act (former 28 U. S. C. § 723 b-c, now 28 U. S. C. § 2072) when applied to plaintiffs or other parties who voluntarily resort to the federal courts and thereby "waive" a portion of their rights to claim the inviolability of their persons. The Sibbach decision does not determine the validity of an attempt to use Rule 35 to force a defendant who becomes a party in a federal court against his will and who does not himself make a claim for damages for personal injuries to suffer invasion of his person in the form of physical and/or mental examinations. Neither the Court of Appeals in its opinion nor this Court has answered the rhetorical question posed at 3 Ohlingers Federal Practice (Rev. Ed.) 610 as quoted in the subject opinion (R. p. 78, 79):

> "Finally, in Sibbach v. Wilson & Co. (1941) 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that it invades no 'substantive' right within the terms of the Enabling Act, as distinguished from a right which is merely 'substantial' or 'important'. To the suggestion that the rule offends the important right to freedom from invasion of the person the court replies that it '. . . ignores the fact that a litigant need not resort to the federal courts unless willing to comply with the rule . . .'."

> "This does not, however, answer the point; what of the litigant who does not resort to a federal court, has no intention of resorting to it, and does not wish to restort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted by the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination."

The Court of Appeals in the majority opinion acknowledged that a number of states have provided for procedural devises, by statute, rules of court or by decision, for the discovery of the mental and physical condition of a party similar to Rule 35. However, as pointed out by the Court of Appeals: "This type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for the mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries". "This was the situation in Sibbach. Indeed, the cases seem to proceed on the theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" a portion of his right to claim the inviolability of his person. In the interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make difficult of proof, that which is the very basis of his action and which is particularly within his knowledge." (R. p. 77).

The petitioner submits the problem is controlled by the policy underlying the *Union Pacific R. Co.* v. *Botsford* (1891) 141 U. S. 250 decision. It rested upon

consideration of the liberties of the subject in denying inherent power:

> "The inviolability of the person is as much involved by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." (at 252).

As was pointed out by Mr. Justice Frankfurter, dissenting in *Sibbach* v. *Wilson & Co.*: "To be sure the immunity that was recognized in the Botsford case has no constitutional sanction." "It is amenable to statutory change. But the inviolability of a person was deemed to have such historic roots in Anglo-American law that it was not to be curtailed unless by clear and unquestionable authority of law."

Your petitioner respectfully submits that the Court should be very slow to sanction any violation of or an interference with the person of a free citizen. Although the court in *Sibbach* v. *Wilson* has held that Rule 35 now constitutes sufficient "authority of law" to justify an invasion of the person of a party whose physical or mental condition is voluntarily in controversy, the petitioner would show that unlike the subject in the *Sibbach* case the petitioner did not resort to the federal court, has no intention of resorting to it, nor has he made claim for personal injuries thereby voluntarily

placing his physical and mental condition in controversy.

If Rule 35 does not constitute lawful authority to require physical and mental examinations of a defendant, as is respectfully contended by this petitioner, no such authority therefor exists, and this Court has refused to recognize any inherent power in federal courts to order such examinations of the person. (*Union Pacific Ry.* v. *Botsford*, 141 U. S. 250 (1891).)

III

IF RESPONDENT HAD POWER TO ORDER PHYSICAL AND MENTAL EXAMINATIONS OF DEFENDANT PETITIONER RESPONDENT ABUSED DISCRETION IN SO ORDERING

Even if Rule 35 should be held to constitute lawful authority for the kind of examinations complained of, the power to order them exists only upon compliance with the conditions of the rule as properly stated by the Court of Appeals (R. p. 81). Such Rule expressly applies only to a "party" whose physical or mental condition is "in controversy" and then only if "good cause" is shown.

A. Respondent's Order Requires Physical and Mental Examinations of Petitioner Who Is Not a Party to the Claim in Which Such Examination Is Sought.

The following pertinent events occurred in the court below and are hereinafter set out chronologically, not to be repetitive or burdensome, but because such chronology is important to the clarity of petitioner's argument.

(1) Amended cross-claim of The Greyhound Corporation (petitioner not a plaintiff) filed against Contract Carriers, Inc. and National Lead Company (R. p. 24-34).

(2) November 13, 1962, answer of Contract Carriers, Inc. and Joseph L. McCorkhill to cross-complaint of The Greyhound Corporation filed (R. p. 34-37).

(3) January 21, 1963, letter of Contract Carriers, Inc. to district judge pursuant to pre-trial order adding additional charges in support of its Second Defense to the cross-complaint of The Greyhound Corporation (R. p. 38-40)

(4) February 5, 1963, petition for physical and mental examinations of petitioner filed by Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company (R. p. 7-14).

(5) February 15, 1963, National Lead Company files answer to amended cross-claim of The Greyhound Corporation and cross-claim against The Greyhound Corporation and Robert L. Schlagenhauf (R. p. 49-54).

(6) February 21, 1963, order of district judge granting February 5th petition for physical and mental examinations of petitioner and ordering said examinations to be conducted by nine physicians (R. p. 5-6).

(7) March 13, 1963, Robert Schlagenhauf files petition for Writ of Mandamus with Court of Appeals of Seventh Circuit (R. p. 1-4).

(8) March 14, 1963, petition for physical and mental examinations of petitioner filed by Contract Carriers, Inc. and Joseph L. McCorkhill (R. p. 55-61).

(9) March 14, 1963, petition for physical and mental examinations of petitioner filed by National

Lead Company (R. p. 64-67). (Unsupported by affidavit).

(10) March 15, 1963, district judge grants petition of Contract Carriers, Inc. and Joseph L. McCorkhill and orders the petitioner to submit to examination by nine physicians (R. p. 62-63).

(11) March 15, 1963, district judge grants petition of National Lead Company and orders the petitioner to submit to examination by nine physicians (R. p. 68-70).

The cross-defendants in their motion of February 5, 1963 for the physical and mental examinations state that:

> "The physical and mental condition of the defendant, Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second pararaph of affirmative answer on the part of the defendants, Contract Carriers and Joseph L. McCorkhill, *to the defendant Greyhound's cross-claim.*" (emphasis supplied).

Thus, the cross-defendants expressly sought the order complained of in connection with the cross-action inasmuch as two of them charged in answer thereto that the cross-claiming Greyhound Corporation was negligent in employing and causing its driver, the petitioner, "to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred which fact was known or should have been known to The Greyhound Corporation." (R. p. 40).

No such charge is made by the plaintiffs Markiewicz in their amended complaint and only in connection with the cross-claim is the physical or mental condition of Robert L. Schagenhauf referred to in the pleadings. As may be noted from the amended cross-claim of The Greyhound Corporation (R. p. 24-34), the sole cross-claimant is The Greyhound Corporation, and the petitioner, Robert L. Schlagenhauf, is not a party to said cross-claim either as a plaintiff or defendant. Rule 35 of the Federal Rules of Civil Procedure, under the provisions of which the order complained of was purportedly issued, expressly applies only to a *party* and may not be extended to include persons who are not parties.

Dulles v. *Quan Yoke Fong* (9th Cir. 1956) 237 F. 2d 496.

Fong Sik Leung v. *Dulles* (9th Cir. 1955) 226 F. 2d 74.

Kropp v. *General Dynamics Corp.* (1962) 202 F. Supp. 207.

After the petition for the examinations was filed on February 5, 1963, it is the fact that the defendant National Lead Company did file a cross-claim naming both The Greyhound Corporation and the petitioner, Robert L. Schlagenhauf, as cross-defendants, but the said National Lead cross-claim (R. p. 52) as to any physical or mental defect of Robert L. Schlagenhauf recited only that Robert L. Schlagenhauf was "tired and sleepy" at the time of the collision and had "impaired and deficient" vision. No mental condition was alleged and no physical defect other than as to vision was alleged. In any event, the National Lead Company cross-claim was not before the court below at the time

the petition for physical and mental examinations was filed and therefore could not have constituted a ground in support thereof.

The petitioner submits he was not a "party" within the meaning of Rule 35 as to either Contract Carriers, Inc., Joseph L. McCorkhill or National Lead Company at the time the original petition for Rule 35 discovery was filed, and he is not yet a party as to either Contract Carriers, Inc. or Joseph L. McCorkhill (see majority opinion below, R. p. 77). The order of February 15, 1963, therefore, as granted upon the petition of Contract Carriers, Inc., Joseph L. McCorkhill, and National Lead Company and the order of March 15, 1963, granted upon the supplementary petition of Contract Carriers, Inc. and Joseph L. McCorkhill were beyond the power of the respondent notwithstanding the validity or non-validity of the additional order of March 15, 1963 as granted upon the unverified second petition of National Lead Company which party by that date had made the petitioner a party defendant to the National Lead Company cross-claim for property damage.

B. Respondent's Order Requires Physical and Mental Examinations of Petitioner Although Petitioner's Physical and Mental Condition Is Not in Controversy in This Action.

Whatever the petitioner's status as a party may be, another prerequisite of Rule 35 before a physical or mental examination may be ordered is that the physical or mental condition of the person to be examined be "in controversy". The plaintiff's amended complaint expressly places the physical conditions of the plaintiffs John and Jennie Markiewicz in issue in that personal injuries are alleged to have resulted to these plaintiffs from the collision complained of, and the

injuries are alleged to be permanent in nature. It is evident, therefore, that the present physical conditions of these plaintiffs are directly "in controversy", the defendants being without information as to the extent and permanency of the injuries alleged. The petitioner, however, has made no claim for personal injuries suffered in the collision, and the petitioner's physical and mental condition is relevant only with reference to the moment of collision. It may be said that the physical and mental condition of any driver involved in a collision is relevant in that the alertness and mental acuity of such driver at the time of the collision may well affect his ability to avoid it. However, may it be concluded that every defendant driver of a motor vehicle involved in a collision is subject to mental and physical examination under the provisions of Rule 35 months and years following the collision?

The personal injury plaintiffs in their amended complaint did not charge this petitioner with any physical or mental condition contributing to cause the collision involved and have not requested either physical or mental examinations of the petitioner. Aside from the allegations of Contract Carriers, Inc. and Joseph L. McCorkhill in defense of the property damage cross-claim of The Greyhound Corporation, to which this petitioner is not a party the only pleading allegation concerning the petitioner's physical or mental condition on the date of the accident is that contained in the National Lead Company property damage cross-claim to the effect that this petitioner's vision was defective (R. p. 52). Thus, the physical or mental conditions which fall within the medical specialties of internal medicine, neurology or psychiatry clearly should not have been considered "in controversy". It is par-

ticularly apparent that the mental condition of the petitioner may not be considered to be "in controversy", and it is suggested that the ordering of psychiatric examinations of the petitioner constitutes a wholly unwarranted invasion of petitioner's right of privacy inasmuch as the conduct of such examinations would necessarily subject the petitioner to the most intimate of inquiries and disclosures involving not only himself but all members of his family. No court in any reported case arising under the Federal Rules of Civil Procedure has ever granted an order requiring even an eye examination of a defendant driver in a tort action and certainly never nine examinations in the several medical specialties involved here. As stated in *Wadlow* v. *Humberd,* (1939), 27 F. Supp. 210, 212, "Obviously the Rule (35) looks to a situation in which the mental or physical condition of a party shall be immediately and directly in controversy and not merely in controversy, incidentally or collaterally." It is submitted that the physical and mental condition of the petitioner is not immediately and directly in controversy under the pleadings before the respondent below and that only the condition of the petitioner's vision is even incidentally or collaterally in controversy. As was succinctly stated by the Court of Appeals (majority opinion R. p. 80): "Mere lip service to the requirements of 'in controversy' and 'good cause' in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy". "The rule was never intended to be used by adverse parties as a means to harass opponents with troublesome mental and physical examinations in the hope that by chance some mental or physical impairment might be discovered."

C. Respondent's Order Was Issued Without a Showing of Good Cause for Either Physical Or Mental Examinations of Petitioner.

A third prerequisite under Rule 35 for the issuance of an order for the physical or mental examination of a party is that good cause therefor be shown. As stated by the Court of Appeals (majority opinion, R. p. 80):

> "While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other means of discovery or proof are less satisfactory considering the law's solicitude for a party's privacy."

The requirement that good cause be shown before a Rule 35 order may be entered is expressed mandatorily and as stated in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, (4th Cir. 1962), 297 F. 2d 921, 924:

> "Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."

The correct application of Rule 35 is even more important than the application of other discovery rules in that an invasion of the person is involved.

See Mr. Justice Frankfurter's dissent in *Sibbach v. Wilson & Co.*, (1941) 312 U.S. 1:

> "I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure, and other devices for the expeditious, economical and fair conduct of litigation."

To their petition of February 5, 1963 for the physical and mental examination of the petitioner, the cross-defendants Contract Carriers, Inc., Joseph L. McCorkhill, and National Lead Company attached a one-page affidavit of one of the attorneys for Contract Carriers, Inc. and Joseph L. McCorkhill averring as the basis for the several examinations requested that (1) the petitioner saw red lights for ten to fifteen seconds prior to the collision, (2) a truck driver witness who was approaching the truck with which the petitioner's bus collided saw lights of the truck for a distance of three-quarters to one-half mile to the rear of the truck immediately prior to the collision, and (3) the petitioner was involved in a similar type collision on a prior occasion. (R. p. 13-14). It should be noted in regard to the first of these sworn statements that it does not include an allegation that the petitioner saw any lights on the rear of the truck involved, but only that he saw lights. Indeed, no statement could have been included that the petitioner saw lights on the truck involved since he has consistently denied seeing any such lights. It is submitted that his seeing lights on any other vehicle ahead of him only serves to support his contention that he was keeping a proper lookout, at least for properly lighted vehicles, and such fact does not support an order for

even an eye examination and certainly not for examination within the specialties of internal medicine, neurology and psychiatry. The second of the sworn statements refers, not to anything seen or not seen by the petitioner, but only to lights observed by the driver of another vehicle, which, as shown by the pleadings, was proceeding during part of the time involved ahead of the bus and thus in a position to obstruct the view of the petitioner bus driver. It is submitted that the view of the said eye-witness from another vehicle in another position on the highway cannot be said to constitute good cause for examination of the petitioner in any of the four specialties designated.

The final statement relied upon as showing good cause recites that the petitioner was "involved" in a similar type collision while operating a motor bus on another occasion. The statement made does not include information as to whether the bus was the striking vehicle or the vehicle struck at the time of the prior collision, and it is submitted that the vague reference to such prior collision included in the said affidavit is wholly insufficient to support the showing of good cause which is expressly required by Rule 35. It may be noted that nowhere in the petition for physical and mental examinations of the petitioner or in the affidavit filed in support thereof is it stated that such examination *at this time* could possibly reveal either the physical or mental condition of the petitioner as it existed on July 13, 1962. Although the co-defendants who sought the examinations conclude that they have no other means than by such examinations to determine the condition of the petitioner, would not the prior condition of the petitioner as revealed by the public records of the Interstate Commerce Commission with

respect to required physical examination be more relevant in showing his condition at the time of his collision than the results of even nine physical and mental examinations performed many months after the collision? The respondent entered the order of February 15, 1963, without a hearing and without inquiring beyond the petition itself. As has been previously argued, at the time the original order was entered on February 15, 1963, the petitioner was not a party.

In the important matter of showing good cause for the multiple examinations of this petitioner, National Lead Company concluded in its petition of March 14, 1963, upon which the respondent's order of March 15, 1963 was entered, only that it could not "properly present" its defense without the four physical and mental examinations asked for (R. p. 66), and good cause is not mentioned in either the National Lead Company's petition or the respondent's order. Neither was the petition of National Lead Company, filed March 14, 1963, supported by affidavit. The respondent entered the orders on March 15, 1963 without a hearing or without inquiry beyond the petitions themselves. As stated by Circuit Judge Kiley in his dissenting opinion (R. p. 83):

> "It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here."

An invasion of an individual's privacy by a physical or mental examination is so serious that a strict standard of good cause must be applied. The petitioner submits that the respondent abused his discretion under the provisions of Rule 35 in ordering the physical and mental examinations of the defendant petitioner where there was no adequate basis established for said order.

D. Respondent's Order Requires Nine Physical and Mental Examinations Even Though Only Four Such Examinations Were Requested.

The motion of the cross-defendants Contract Carriers, Inc., Joseph L. McCorkhill, and National Lead Company, which led to the respondent's order of February 21, 1963, specifically asked only that Robert L. Schlagenhauf be examiner by one of two nominated internists, one of two nominated ophthalmologists, one of three nominated neurologists, and one of two nominated psychiatrists (R. p. 9). However, the respondent entered the order not only sustaining the cross-defendants' motion, but greatly exceeding its prayer in that nine examinations were ordered instead of the already excessive number of four examinations requested. (R. p. 5, 6). The motion of the cross-defendant National Lead Company which led to the respondent's order of March 15, 1963 specifically asked only that Robert L. Schlagenhauf be examiner by one qualified specialist in the fields of internal medicine, ophthalmology, neurology and psychiatry. (R. p. 66). However, the respondent entered the order dated March 15, 1963 not only sustaining the cross-defendant's motion, but greatly exceeding its prayer in that nine examinations were ordered instead of the already excessive number

of four examinations requested. (R. p. 68. 69). It may only be concluded that the additional five examinations were ordered independently of the motion and contrary to the provisions of Rule 35 (a), which provides that "the order may be made only on motion for good cause shown . . .". Apart from Rule 35, the respondent could only have entered on order for physical and mental examinations if a statute of the State of Indiana authorized such an order (See *Camden & Suburban Ry. Co.* v. *Stetson* (1900), 177 U.S. 172, 20 S. Ct. 614, 44 L. ed. 721). There is no such Indiana statute and, although the Indiana Supreme Court has recognized a right to compel a physical examination despite the absence of statutory authority, the right is limited to defendants in compelling the physical examinations of plaintiffs in personal injury actions. (City of South Bend v. Turner (1900, 156 Ind. 418, 60 N.E. 271)). The respondent's order, therefore was wholly unauthorized and constituted a usurption of judicial power as to the ordering of the five additional examinations. The petitioner respectfully submits that the respondent therein committed gross error amounting to an abuse of discretion.

IV

RESPONDENT'S ORDER IS NOT IN CONFORMITY WITH RULE 35 AND THEREFORE VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS

The important nature of these issues was expressly recognized by the Court of Appeals, as aforesaid, and it is evident that appeal is a wholly inadequate relief in that the invasion of the petitioner's person and deprivation of his liberty would necessarily have become an accomplished fact at the time of final judgment in the property damage cross-claim below unless

petitioner would elect to refuse examination, thus becoming subject to the drastic penalties authorized by Rule 37 (b) (2) of the Federal Rules of Civil Procedure. It is submitted that the enforced delivering up of one's person to restrain or interference by others is far more than a technical or unimportant invasion of personal privacy and that it is indeed irreparable in that it cannot be righted or retracted. If it may be said that the respondent acted in conformity with Rule 35 of the Federal Rules of Civil Procedure, which has the force of law, then petitioner would not be in a position to complain that his constitutional rights have been violated. As stated in *Lewis* v. *Johnston* (7th Cir. 1940), 112 F. 2d 447, in which it was claimed that the plaintiff's substantive right of privacy in his rights under the 4th, 5th and 14th Amendments to the United States Constitution were violated, the court properly said:

> "We are of the opinion that the order of a district court made in conformity to the rule in question did not violate any constitutional rights of the plaintiff."

However, in the foregoing argument petitioner has set forth those grounds upon which he honestly contends that the order entered against him was not within the power of a district court to issue, or assuming the district court had authority, said order was not in conformity with Rule 35 and exceeded the authority granted in that rule. If, in fact, the orders of the respondent are not authorized by clear and unquestionable authority of law, pursuant to Rule 35, there being no inherent power in federal court to order such examinations of a person (*Union Pacific Ry.* v. *Botsford* (1891), 141 U.S. 250), it is respectfully urged that

said orders constitute an invasion of the petitioner's person and a deprivation of his liberty and thereby violates his right of privacy and the following guarantees of the Constitution of the United States:

4th Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment, United States Constitution:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

V

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

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IN THE

United States Supreme Court

October Term, 1964

No. 8

ROBERT L. SCHLAGENHAUF, *Petitioner*,
v.
CALE J. HOLDER, United States District Judge for the Southern District of Indiana,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for The Seventh Circuit

BRIEF FOR RESPONDENT

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MISCELLANEOUS

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at (R. 70-81) 321 F. (2d) 43. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1963 (R. 84). Robert L. Schlagenhauf filed a petition for certiorari on October 18, 1963, and the same was granted on January 13, 1964 (R. 85, 84 U. S. 516).

The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

FEDERAL RULES INVOLVED

Although the Petitioner has asserted that there are several constitutional provisions, Federal statutes and Federal rules involved, this case involves only the interpretation of Rule 35(a) Federal Rules of Civil Procedure. This rule provides:

> "(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the Court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, condition and scope of the examination and the person or persons by whom it is to be made."

QUESTIONS PRESENTED

This action arose when the Petitioner drove a Greyhound bus loaded with passengers into the rear of a tractor-trailer while both vehicles were moving along a four-lane divided highway. The tractor involved was owned by Contract Carriers, Inc. and driven by Joseph L. McCorkhill. The trailer was owned by National Lead Company. Each of these three parties, along with Greyhound Corporation, and the Petitioner were named as party defendants in a personal injury action brought by several bus passengers. In taking pretrial-discovery depositions, it was ascertained that Petitioner had been involved in a similar type accident near the town of Flatrock, Michigan, while driving a bus for Greyhound Corpora-

tion; that the lights on the tractor-trailer struck by Petitioner were visible from three-fourths to one-half mile to the rear; and that Petitioner himself saw red lights ahead of him for a period of ten to fifteen seconds prior to the impact, yet did not reduce speed or alter his course.

Seeking to find the reason for this tragic accident, the defendants Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company filed a petition for a physical and mental examination of Petitioner. This petition sought an examination by a specialist in the field of opthalmology, neurology, psychiatry and internal medicine. The district court entered an order on February 21, 1963 ordering an examination by two opthalmologists, two internists, two psychiatrists, and three neurologists.

Subsequent to the granting of the motion under Rule 35(a), the defendants, Contract Carriers, Inc.; Joseph L. McCorkhill; and National Lead Company filed a supplemental petition on March 14, 1963, with Contract Carriers, Inc. and Joseph L. McCorkhill alleging that the physical and mental condition of Petitioner was in controversy by reason of their answer in general denial to Greyhound Corporation's cross complaint, and National Lead Company alleging that his physical and mental condition was in controversy by reason of its cross complaint filed against Petitioner. The district court granted the supplemental petition on March 15, 1963.

The Petitioner then applied to the Court of Appeals for the Seventh Circuit for a Writ of Mandamus requiring the district court to vacate its order of February 21, 1963 and March 15, 1963.

The Court of Appeals denied the petition and in so doing held that insofar as Contract Carriers, Inc. and Joseph L. McCorkhill were concerned Petitioner was not a

party within the meaning of Rule 35(a); but insofar as National Lead was concerned he was.

Subsequent to this decision and before any application was made to this Court; the district court, upon petition filed by National Lead Company, vacated its previous order and ordered petitioner to submit to a total of four examinations—one in each field of specialty requested. The questions therefore presented are:

1. Should this Court review a denial of the extraordinary remedy of mandamus under the facts here asserted?

2. Was the petitioner, Robert L. Schlagenhauf, a party whose mental and physical condition was in controversy within the meaning of Rule 35, Federal Rules of Civil Procedure?

3. Was there justification under the pleadings and uncontradicted affidavit evidence for the exercise of the Respondent's discretion in granting the order?

4. Did the Respondent in any manner abuse his discretionary power in ordering multiple expert examinations under the facts shown here?

STATEMENT

The action arose out of a motor vehicle accident which occurred on July 13, 1962. (R. 16) On July 17, 1962 an action was commenced when Edward Markiewicz, John Anthony Markiewicz and Jennie Markiewicz filed a complaint in three paragraphs against the Greyhound Corporation, a common carrier; Robert L. Schlagenhauf, Greyhound's driver; Contract Carriers, Inc.; and Joseph L. McCorkhill, Contract Carriers' driver. On November 8,

1962 an amended complaint was filed naming National Lead Company as an additional party-defendant. (R. 15-24) The amended complaint alleges that the accident occurred on U. S. 40, which is a four-lane highway with two lanes for east bound traffic and two lanes for west bound traffic. John and Jennie Markiewicz were paying passengers on the Greyhound bus which was traveling east and which bus ran into the rear of a trailer being pulled by Contract Carriers' tractor, which was also traveling east. John and Jennie Markiewicz received personal injuries, and the complaint seeks $1,000,000.00 compensatory damages and $300,000.00 exemplary damages for John Markiewicz's personal injuries; $30,000.00 compensatory damages and $50,000.00 exemplary damages for Jennie Markiewicz's personal injuries; and $250,000.00 compensatory damages for the loss of services of John and Jennie Markiewicz, by Edward Markiewicz, father and husband, respectively, of the two injured bus passengers. (R. 15-24)

The defendant Greyhound filed its answer to the complaints and filed a counter-claim against Contract Carriers and Joseph L. McCorkhill, its driver; National Lead, owner of the trailer which was being pulled by Contract Carriers; and General Motor Corporation, a third-party defendant. The counter-claim filed by Greyhound seeks to recover for the damage to the front of the bus, caused when Mr. Schlagenhauf drove the bus into the rear of the trailer owned by National Lead Company and pulled by Contract Carriers, Inc. (R. 24-34)

The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, filed their answer in general denial to the amended complaint. (R. 43-44) The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, filed an answer in three paragraphs to Greyhound's counter-claim, the

first paragraph in general denial; the second paragraph alleging that the negligence of the defendant, Robert L. Schlagenhauf, in operating the bus was the proximate and contributing cause of the damage; the third paragraph alleging that the defendant, Robert L. Schlagenhauf, was guilty of wilful and wanton misconduct which proximately caused the damage to Greyhound's bus. (R. 34-37)

Contract carriers and Joseph L. McCorkhill filed a letter with the Court pursuant to the Respondent's pre-trial order, setting forth the specific allegations relied upon in defense of the counter-claim. (R. 38-40) Among these allegations were:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to the Greyhound Corporation." (R. 40)

The defendant, National Lead, filed its answer to the amended complaint in general denial. (R. 46-47) National Lead filed its answer to Greyhound's counter-claim, the first paragraph in general denial, and also filed a counter-claim against Greyhound and Robert L. Schlagenhauf. (R. 49-53) The counter-claim alleged, among other things, *that Robert L. Schlagenhauf was operating the bus when he knew, or should have known, that his vision was impaired.* (R. 52)

On February 5, 1963 Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company, filed a petition seeking to require the defendant, Robert L. Schlagenhauf,

the bus driver, to submit to a series of physical examinations in an effort to find the true reason and explanation for this accident. (R. 7-10) Said petition gave the following reasons for such examination:

> "(1) The Defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motor-bus for the defendant, Greyhound Corporation. (R. 9)
>
> (2) The lights of the tractor-trailer unit, which was struck by the bus driven by the Defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle. (R. 9)
>
> (3) The Defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course." (R. 9)

The petition further showed that examinations by multiple experts were required because no one doctor could examine the Defendant Schlagenhauf respective to all of the conditions which related to his driving ability. Further, the petition showed the Court that without such examinations, the Defendants Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company would be without means to present evidence on this issue and would be unable to properly present their defense. (R. 7-10)

The District Court on February 21, 1962 ordered the Defendant, Mr. Schlagenhauf, to submit to physical and mental examinations by two named interists, two named ophthalmologists, three named neurologists and two named psychiatrists. (R. 5-6)

On March 14, 1963 Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company, filed a supplemental petition for a physical examination of Mr. Schlagenhauf. The supplemental petition of Contract Carriers and Joseph L. McCorkhill alleged that such examinations are necessary as the physical and mental condition of Mr. Schlagenhauf is in issue by virtue of the answer of general denial to Greyhound's cross-complaint. (R. 55-59)

The supplemental petition of National Lead Company, alleged that the physical and mental condition of Mr. Schlagenhauf is an issue under the cross complaint filed by National Lead Company against Greyhound and Robert Schlagenhauf. (R. 64-67)

The district court issued an order on March 15, 1963 granting Contract Carriers, Inc.'s, Joseph L. McCorkhill's and National Lead Company's prayer for physical and mental examinations of Mr. Schlagenhauf. (R. 62-63—68-70)

The Petitioner then applied to the Court of Appeals for the Seventh Circuit for a Writ of Mandamus requiring the Respondent to vacate his orders of February 21, 1963 and of March 15, 1963. (R. 1)

The Court of Appeals refused to issue the writ. (R. 70)

Subsequent to the decision of the Court of Appeals, the Respondent vacated the order which was the subject of that Court's decision, and ordered the Petitioner to submit to one examination in each of four areas of medical specialty. (A. 10-A. 11)

ARGUMENT

I

THE PETITIONER HAS FAILED TO SHOW SUFFICIENT FACTS TO WARRANT THE EXTRAORDINARY WRIT OF MANDAMUS

This court has previously held that there are no constitutional prohibitions to Rule 35, Federal Rules of Civil Procedure. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Rule 35 being within the power of this Court to promulgate, then it must follow that it was within the power of the Respondent to apply.

The rule itself is clear. It applies to a party. It does not contain any language limiting its application to a party-plaintiff, but applies to parties generally. To argue that Robert L. Schlagenhauf is not a party ignores the obvious. He was the individual who drove the bus into the rear of a tractor-trailer while both vehicles were moving along a four-lane highway. He is a named party in the initial action filed. He is a named party-defendant to the cross-complaint filed by National Lead Company. It is alleged in the letter filed by Contract Carriers, Inc. and Joseph L. McCorkhill pursuant to Respondent's pretrial order that the sole proximate cause of the accident was the negligence of Robert L. Schlagenhauf in operating the bus while physically and mentally sick.

The power to order a party to submit to a physical examination being unquestioned, and the fact that Petitioner is a party being likewise unquestioned, the question

narrows to whether this Court will resort to the extraordinary writ of mandamus to supervise the trial court's exercise of its discretionary power.

This Court has announced its intention to avoid interferring with the discretionary powers of the trial court.

In *Ex Parte Fahey* (1947), 332 U. S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041, this Court held:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes."

In *Fisher v. Delehart* (C.C.A. 8th, 1959), 250 F. (2d) 265, the Court held:

> "We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion entrusted to him by law."

In *Belships Co. Ltd., Skibs A/S v. The Republic of France* (C.C.A. 2d 1950), 184 F. (2d) 119, the Court held:

> "While we have authority to issue one of the extraordinary writs prayed for in aid of our appellate jurisdiction, we have been admonished that this should be done only when necessary in extraordinary cases, and not as a means of interlocutory appeal."

The Petitioner has not shown any extraordinary cause for mandamus. He has not demonstrated wherein the Respondent has enlarged or nullified the Rules of Civil Procedure. The only reason for mandamus advanced by Petitioner is his personal inconvenience. To permit the extraordinary remedy of mandamus to issue opens the door for litigants to challenge discovery orders and to gain appellate supervision over trial judges operating in their discretionary sphere. Such has not been the policy of this Court. The order in this case, like similar discovery orders constantly being entered by trial courts, sought to uncover only the true facts. What harm does this cause Petitioner? To paraphrase the language of the Court of Appeals in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2: if the examination shows nothing was wrong with Petitioner, he certainly was not harmed; and if the examination shows his physical or mental condition caused this tragic accident, a miscarriage of justice has been averted.

II

THE PETITIONER, ROBERT L. SCHLAGENHAUF, IS A PARTY WHOSE MENTAL AND PHYSICAL CONDITION IS IN CONTROVERSY WITHIN THE MEANING OF RULE 35

The Court of Appeals' opinion is based upon this Court's pronouncements that there are no constitutional prohibitions against ordering a party to submit to a physical or mental examination. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Initially, this Court held that the Federal Court did not have inherent power to order a party to submit to a

physical or mental examination. *Union Pacific R. Co. v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734.

In *Camden & Suburban Ry. v. Stetson* (1900), 177 U. S. 172, 20 S. Ct. 614, 44 L. Ed. 721, this Court recognized that if state statutory authority existed the Federal Court sitting therein could also order a physical or mental examination.

Both *Botsford* and *Stetson* were considered by the Advisory Committee on Rules (see notes of Advisory Committee on Rules following Rule 35 U.S.C.A.) and the rule was written to fill the gap that existed between *Botsford* and *Stetson*.

Following the adoption of the rule, the District Court for the Western District of Missouri in *Wadlow v. Humberd* (D.C. W.D. Mo. 1939), 27 F. Supp. 210, 1 F. R. Serv. 35a.21, Case 1, narrowly interpreted Rule 35 in holding that it applied only to personal injury cases, and when the physical and mental condition was "immediately and directly" in controversy.

This narrow construction was seriously criticized by text writers and was disapproved in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2, wherein the Court in order to achieve justice applied the rule in an action by a wife for maintenance of a child where there was a counterclaim based upon adultery and a denial of paternity; the Court holding that the child was a "party" for the purpose of the physical examination rule.

In the Chinese naturalization cases of which *Lue Chow Ken v. Brownell* (C.C.A. 2d 1955), 220 F. (2d) 187, 21 F. R. Serv. 35a.21, Case 1, is representative, the Courts

have permitted blood tests to be taken of parties in order to prove or disprove paternity and citizenship.

Also, in *Countee v. U. S.* (C.C.A. 7th 1940), 112 F. (2d) 442, 3 F. R. Serv. 35a.5, Case 1, the Court authorized a physical examination in a case involving an action on a war risk policy.

In all of these situations, the physical condition of the party being examined was not "immediately and directly" in controversy which is the position of the Petitioner. The physical condition was in controversy, however, and the establishment of the facts was necessary to obtain a just result.

Petitioner's argument that Rule 35 can only be applied to a plaintiff or to other parties who voluntarily resort to the Federal Court for relief and thereby waive a portion of their rights, does not meet the test of logic. What rule shall govern in a case commenced in state court and which is removed to a federal court by the defendant? In this situation the Petitioner's position would require that insofar as the plaintiff is concerned *Botsford* or *Stetson* would govern, but insofar as the defendant is concerned Rule 35 would be applicable. Obviously, the act of using a federal court as a forum is an irrelevancy in applying the rule. If waiver is the rationale, then *Sibbach* becomes irrelevant because this court would then be recognizing that the rule treats of substantive rights and not procedure.

Rule 35 was adopted to enable parties to litigation to ascertain the true facts concerning the mental or physical condition of any other party if basically in controversy. The policy of the rule is to compel full disclosure of the facts concerning any party's physical or mental condition so that nothing is hidden from the fact finder. The language of the rule is clear and unambiguous. It does not

limit its application, as the Petitioner would suggest, to a "party-plaintiff" or a party voluntarily resorting to federal courts, but the rule applies to a "party." The rule does not require the physical or mental condition to be specifically "in issue," but it suffices if it is "in controversy."

III

THERE WAS JUSTIFICATION UNDER THE PLEADINGS AND UNCONTRADICTED AFFIDAVIT EVIDENCE TO JUSTIFY THE RESPONDENT'S EXERCISE OF DISCRETION IN ORDERING THE PETITIONER EXAMINED

Thus far the Courts have consistently held that the granting of a motion for a physical examination of a party is within the discretion of the trial court.

Bucker v. Krause (C. A. Ill. 1953), 200 F. (2d) 576, cert. den., 345 U. S. 997, 73 S. Ct. 1141, 97 L. Ed. 1404, rehearing denied, 346 U. S. 842, 74 S. Ct. 17, 98 L. Ed. 362;

Teche Lines v. Boyette (C.C.A. Miss. 1940), 111 F. (2d) 579.

The Courts of Appeal have consistently refrained from interferring with the trial court's discretion.

Fisher v. Delehart (C.C.A. 8th 1959), 250 F. (2d) 265.

The Respondent in the instant case did not abuse his discretion. The facts before the Court showed that the Petitioner drove a bus load of passengers into the rear of a tractor-trailer moving in the same direction as the

bus. The accident occurred on a four-lane highway. Discovery depositions were taken and it developed that the Petitioner had been involved in a similar accident on a previous occasion; that the Petitioner saw red lights ahead of him for 10 to 15 seconds prior to the collision, yet did not reduce the speed or alter his course; and that the lights on the rear of the tractor-trailer were visible for one-half to three-fourths of a mile. In addition to these facts being a part of the record in the case, an affidavit was attached to the petition again setting them out in detail. The motion and the affidavit were filed on February 5, 1963 and were pending in the Court for 16 days before the Respondent acted. At no time did the Petitioner file any counter-affidavits contesting the facts which were before the trial court. Surely, the Petitioner should be required to submit at least counter-affidavits before he attacks, by seeking an extraordinary writ, the exercise of discretionary power by the trial court.

Not only was good cause shown but the physical and mental condition of the Petitioner was in controversy. It was in controversy under the pleading allegations of National Lead Company's cross-complaint. His physical and mental condition was in controversy under the letter filed by Contract Carriers, Inc. and Joseph L. McCorkhill pursuant to Respondent's pretrial order, which letter specifically stated that the sole proximate cause of the accident was Petitioner driving the bus while being physically and mentally impaired. Such allegations certainly place the Petitioner's physical and mental condition in controversy.

Petitioner has argued throughout this case that there must be specific pleading allegations concerning his physical or mental condition. This is not true. The rule requires his physical or mental condition to be in controversy, not

in issue. It is not incumbent for the co-defendants to plead other than a general denial to show that Petitioner's actions were the sole proximate cause of the accident.

Regardless of whether the ultimate controversy is paternity, citizenship or sole proximate cause of an accident, Rule 35 is broad enough as a tool to aid in ascertaining the true facts in order that a just result can be obtained.

IV

THE RESPONDENT DID NOT ABUSE HIS DISCRETIONARY POWER IN ORDERING MULTIPLE EXAMINATIONS

The Petitioner has devoted a substantial portion of his brief to arguing that the ordering of nine physical examinations was an abuse of discretion The Petitioner is well aware of the fact that the Respondent has corrected this initial order and that he is required to submit to one examination in four areas of medical specialty.

Respondent acknowledges that initially the order entered required Petitioner to submit to physical and mental examinations by two internists, two opthalmologists, two psychiatrists, and three neurologists. Without seeking to have the order amended or corrected, the Petitioner applied for and obtained a stay of proceedings pending the decision on his petition for a Writ of Mandamus. Following the denial of this Writ by the Court of Appeals, the Petitioner still did not seek to have the number of examinations reduced to that prayed for in the petition. The co-defendant, National Lead Company, did however call the Respondent's attention to the number of examinations and the Respondent reduced the number to one in

each of the four recognized areas of medical specialty. This action of the Respondent was done only after the temporary stay order was dissolved by the Court of Appeals and before Petitioner had requested certiorari.

It seems that this court should not review an order that does not exist. It would further appear that the Petitioner should have brought this point out in his brief so that this court would be fully apprised of the facts as they exist.

Respondent would further show the Court that the additional part of the record showing these proceedings was made a part of the record on the petition for certiorari but the Clerk would not print these proceedings with the record. These proceedings are, however, included in this brief as an appendix.

It is not an abuse of discretion for the Respondent to order Petitioner to be examined in different recognized specialties having relevance to the possible physical and mental aberrations which could have been present and affected his ability to see or appreciate dangers. In today's complex society, it is certainly not an abuse of discretion to order examinations in various areas of medical specialty in the search for the truth. That the Court is not limited to ordering one examination is clearly stated in 2A Barron and Holtzoff, Federal Practice & Procedures, Sec. 822, P. 483 (1961):

> "• • • Such a limitation is wholly inconsistent with the realities of modern medical practice, where specialists from various branches of medicine are required. There is nothing in the rule to prevent the Court from ordering examinations by all of them."

This Court should not invoke the extraordinary remedy of mandamus to review the exercise of the trial court's

discretion in its search for truth. An examination in four recognized fields of medical specialty certainly is not an abuse of discretion, particularly under the pleadings and uncontradicted affidavit evidence.

V

RESPONDENT'S ORDER DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS

Either Rule 35 has constitutional limitations or it does not. This Court has held that it does not. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 82 L. Ed. 479.

Union Pacific Ry. v. Botsford (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734, held that there was no inherent power in the Federal Court to order a physical or mental examination of a party; and that without statutory authority the Federal Court could not order such examination.

Camden & Suburban Ry. v. Stetson (1900), 177 U. S. 172, 20 S. Ct. 614, 44 L. Ed. 721, held that if there was state statutory authority for such examination, then a Federal Court sitting in that state could order an examination.

Obviously, if there is a constitutional prohibition against such examination neither a federal nor a state statute could abridge such prohibition. To find a constitutional infringement here would, of necessity, require overruling *Botsford*, *Stetson* and *Sibbach*.

Further, if a constitutional prohibition is present, then Rule 35 must be completely unconstitutional as a party plaintiff in a personal injury action would have the same protection as Petitioner. It would be a novelty in American jurisprudence to hold that one party to litigation has constitutional protection and another has not. It would also

be a novelty to hold that a party-plaintiff in a personal injury action waives constitutional protection by seeking relief in a Federal Court.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

ERLE A. KIGHTLINGER,

HOWARD J. DE TRUDE, JR.,

ARIBERT L. YOUNG,
626 Fidelity Building,
111 Monument Circle,
Indianapolis, Indiana,

KEITH C. REESE,
156 East Market Street,
Indianapolis, Indiana,

Counsel for Respondent.

INDEX To APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right, *Plaintiffs,* v. THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., *Defendants.* and NATIONAL LEAD COMPANY, *Third Party Defendant.*	No. IP 62-C-285

PETITION TO AMEND COURT ORDER AND TO ORDER DEFENDANT, ROBERT L. SCHLAGENHAUF, EXAMINED PHYSICALLY

The defendant, National Lead Company, prays that this Court modify its order heretofore entered on March 15, 1963 ordering the defendant Robert L. Schlagenhauf, examined by nine (9) physicians, said previous order of the Court being in the words and figures as follows:

(H.I.)

the defendant, National Lead Company, prays that the Court modify this order to require said defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians:

Dr. L. Leo Loughlin, M.D.	Dr. A. Ebner Blatt, M.D.
Dr. Karl L. Manders, M.D.	Dr. Jack I. Taube, M.D.

This Court has heretofore ordered that counsel for defendant, National Lead Company, and counsel for defendant, Robert L. Schlagenhauf, and the Greyhound Corporation, to agree as to dates and times for said physical examinations; it was impossible to agree on specific dates and the defendant, National Lead Company further prays that the Court order said defendant, Robert L. Schlagenhauf to be examined by the four (4) said doctors on the dates and times as follows:

Dr. L. Leo Loughlin, M.D. Phychiatrist 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt Internist 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. Neurologist 8:30 A.M. 10/7/63	Dr. Jack I. Taube Opthalmologist 11:00 A.M. 10/10/63

The Petitioner further shows the Court that certain appointments have been made and that on September 6, 1963, the attorneys for Robert L. Schlagenhauf were advised of said times and dates; per copy of a letter which is attached hereto, and marked Exhibit "A"; but that attorneys for Schlagenhauf have advised that said appointments cannot be kept by Schlagenhauf.

WHEREFORE, Petitioner prays that this petition and all things herein contained be sustained.

Rocap, Rocap, Reese & Robb,

By Keith C. Reese,
Attorneys for Defendant,
National Lead Company.

156 E. Market Street,
Indianapolis, Indiana,
MElrose 8-7547.

EXHIBIT "A"

September 6, 1963

Smith & Yarling
Attorneys at Law
1313 First Federal Building
13 N. Pennsylvania Street
Indianapolis, Indiana

Re: John Anthony Markiewicz, bnf
Edward Markiewicz, et al.
v.
The Greyhound Corporation
Robert L. Schlagenhauf
Joseph L. McCorkhill
Contract Carriers, Inc. and
National Lead Company
Cause No. IP 62-C-285

Attention: Mr. Richard Yarling

Dear Dick:

Confirming our several conferences concerning physical examination of Robert L. Schlagenhauf, we wish to ad-

vise that we have made the following appointments with the following doctors:

Dr. L. Leo Loughlin, M.D. psychiatrist 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt Internist 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. neurologist 8:30 A.M. 10/7/63	Dr. Jack I. Taube Opthalmologist 11:00 A.M. 10/10/63

These doctors have advised that if the reserved time is not used by Mr. Schlagenhauf, and no other patient uses the time, that they will charge for said allotted time. We wish to advise you that if Mr. Schlagenhauf cannot keep these appointments, and there is any charge we will expect Mr. Schlagenhauf to pay same.

We are attempting to arrange other physical examinations as ordered by the Court, and will advise you when this has been accomplished.

Yours very truly,

Rocap, Rocap, Reese & Robb,
Keith C. Reese,

KCR:as
cc Mr. A. L. Young
Armstrong, Gause, Hudson & Kightlinger, attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of said Petition has been sent this 14 day of September, 1963 to Smith & Yarling, 13 North Pennsylvania Street, Indianapolis, Indiana, Townsend and Townsend, Indiana Building, Indianapolis, Indiana, Edmund Pawelec, Western Saving Fund Building,

Philadelphia, Pennsylvania, Locke, Reynolds, Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, Sheldon Breskow, Lemcke Building, Indianapolis, Indiana, Lewis, Weiland, Payne and Carvey, Monument Circle, Indianapolis, Indiana by posting it in the United States Mail.

Rocap, Rocap, Reese & Robb,
By Keith C. Reese

Rocap, Rocap, Reese & Robb
156 East Market Street.
Indianapolis, Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,

Plaintiff,

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., NATIONAL LEAD COMPANY,

Defendants.

No. IP 62-C-285

OBJECTIONS AND BRIEF OF DEFENDANT ROBERT L. SCHLAGENHAUF IN OPPOSITION TO PETITION TO ORDER PHYSICAL AND MENTAL EXAMINATIONS

The defendant Robert L. Schlagenhauf respectfully submits the following brief in opposition to the petition filed by defendant National Lead Company herein on September 16, 1963 to order this defendant to submit to physical and mental examinations by the four physicians named in the said petition, to-wit: Dr. L. Leo Loughlin, psychiatrist; Dr. Karl L. Manders, neurologist; Dr. A. Ebner Blatt, internist; and Dr. Jack I. Taube, opthalmologist:

This defendant has hereinbefore filed his brief in opposition to the original petitions of defendant National Lead Company and defendant Contract Carriers, Inc. for such examinations, asserting that the physical and mental condition of the defendant Robert L. Schlagenhauf is not "in controversy" herein in the sense that these words are used in Rule 35 of the Federal Rules of Civil Procedure; that good cause has not been shown for the multiple examinations prayed for by the cross-defendant; and that the ordering of such examinations, including mental examination, of a defendant driver is wholly unprecedented and beyond the authority extended by Rule 35. A review of the points and authorities set forth in the said original brief is respectfully requested. In addition to the quotation from *Union Pacific R. Co. v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 previously set forth that:

251 "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of

> his own person, free from all restraint or interference of others, unless by clear and unequestionable authority of law * * * ."

the attention of the Court is respectfully called to the quotation respecting the requirement of the showing of good cause under Rule 35 as set forth in *Guilford National Bank of Greensboro v. Southern Ry. Co.* (4th Cir. 1962), 297 F. (2d) 921:

> 924 "There appear to be adequate policy reasons for imposing the good cause requirement of Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."

In opposition to the requirement of any examinations at all, much less four examinations including mental examination, this defendant asserts again that good cause has not been shown for such examinations, and no such cause is alleged or supplemented in the petition filed on September 16, 1963 by defendant National Lead Company. It is further respectfully pointed out to the Court that no hearing has been held to inquire into the existence of good cause, if any, and there has been no showing by the defendant National Lead Company that no adequate alternate method exists of making proof of this defendant's physical and mental condition or that examinations at this time will shed light upon this defendant's condition at the time of the accident more than a year ago.

In opposition to the particular examinations and the times thereof, objection is further made that in any event the defendant Robert L. Schlagenhauf could not appear for the examination schedule by Dr. Leo Loughlin for Sep-

tember 24, 1963 for the reason that the presence of this defendant is required in the City of Philadelphia, State of Pennsylvania, during all of the week beginning September 23, 1963 to participate actively in the defense of actions entitled Norma Pauline, Joseph Pauline, Frederick Pauline, and *Catherine Pauline v. The Greyhound Corporation* which are pending in the Court of Common Pleas in the said City and State, the trial of which commences on the 23d day of September, 1963 and which arise out of the same collision involved herein; and additional objection is made to examination by Dr. Karl L. Manders, a neurologist, for the reason that the said Dr. Manders has testified and is to testify for plaintiffs in many cases being defended by this defendant's attorneys and is verily believed to be prejudiced toward the said attorneys and therefore toward this defendant to the extent that this defendant could not receive a fair and impartial examination and report thereof by the said Dr. Manders.

The defendant Robert L. Schlagenhauf respectfully prays that the petition of defendant National Lead Company be denied and that any and all prior orders for the physical and mental examination of this defendant be set aside.

Respectfully submitted,

Smith & Yarling,

By Richard W. Yarling,
1313 First Federal Bldg.,
Indianapolis, Indiana

Attorneys for Defendant

Robert L. Schlagenhauf.

VERIFICATION

Richard W. Yarling, being first duly sworn, deposes and says that he has read the foregoing Objections and Brief and that the statements of fact contained therein are true.

/s/ Richard W. Yarling

Richard W. Yarling

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, the undersigned, a Notary Public, in and for said county and state this 18th day of September, 1963.

Donald K. Tunnell
Notary Public.

My commission expires 6-26-65

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the defendant Robert L. Schlagenhauf, certifies that copies of the foregoing Brief were forwarded by first class U. S. Mail, postage prepaid, on the 18th day of September, 1963, to Rocap, Rocap, Reese & Robb, 156 E. Market Street, Indianapolis, Indiana, attorneys for defendant National Lead Company; Townsend & Townsend, 403 Indiana Building, Indianapolis, Indiana, attorneys for plaintiffs; Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, attorneys for defendant Contract Carriers, Inc. and Joseph L. McCorkhill; and to Locke, Reynolds,

Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, attorneys for cross-defendant General Motors Corporation.

Richard W. Yarling
Attorney.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants.

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

No. IP 62-C-285

ORDER

The Defendant, National Lead Company, has filed its Petition To Amend Court Order and To Order Defendant, Robert L. Schlagenhauf, Examined Physically, which petition is in the words and figures as follows:

(H.I.)

The Court hereby grants said petition and vacates its or-

der requiring Robert L. Schlagenhauf to be examined by nine (9) physicians, said order being dated March 15, 1963 and the Court having read and examined said petition and being duly informed and advised in the premises now grants said petition.

The Court now orders the defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians on the dates and times indicated:

Dr. L. Leo Loughlin, M.D. 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. 8:30 A.M. 10/7/63	Dr. Jack I. Tabue 11:00 A.M. 10/10/63

Cale J. Holder
Judge, United States District Court

DATED this Sept. 18, 1963
day of September, 1963

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF,
Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana,
Respondent.

Stay Order

Upon consideration of the emergency motion for stay of proceedings and/or stay of enforcement of any and all orders of the respondent requiring the physical and mental examination of petitioner, as filed by the petitioner herein, to enable said petitioner to seek review of this Court's decision of July 23, 1963, by way of petition for writ of certiorari to the Supreme Court of the United States, and it appearing that good cause theretor exists, it is

ORDERED, that the proceedings in consolidated causes No. IP 62-C-285 and IP 62-C-308 as docketed in the United States District Court for the Southern District of Indiana shall be and hereby are stayed, including the enforcement of any and all orders of said respondent requiring petitioner to submit to physical and mental examination pending the filing and disposition of petitioner's petition for writ of certiorari to the Supreme Court of the United States for review of this Court's decision of July 23, 1963 herein.

DATED September 24, 1963.

/s/ Luther M. Swygert
Circuit Judge

A True Copy:
Teste:
Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 569

ROBERT L. SCHLAGENHAUF,
Petitioner,

v.

CALE J. HOLDER, United States Judge for the Southern District of Indiana,
Respondent.

ENTRY

Cale J. Holder, United States District Judge for the Southern District of Indiana, Respondent, hereby directs the Clerk of the United States District Court for the Southern District of Indiana to properly certify to the Supreme Court of the United States as the following portions of the record involving pertinent matters occurring in his court subsequent to the decision of the United States Court of Appeals for the Seventh Circuit and prior to the filing of the petition for a writ of certiorari herein, which proceedings occurred in a cause entitled and numbered: "John Anthony Markiewicz, a minor by his father and next friend, Edward Markiewicz and Jennie Markiewicz, in their own right, Plaintiff v. The Greyhound Corporation, Robert L. Schlagenhauf, Joseph L. McCorkhill, and Contract Carriers, Inc., Defendants, and National Lead Company, Third Party Defendant," No. IP 62-C-285, to-wit:

Petition to Amend Court Order and to Order Defendant, Robert L. Schlagenhauf, Examined Physically, filed September 16, 1963;

Objections and Brief of Defendant Robert L. Schlagenhauf in Opposition to Petition to Order Physical and Mental Examinations, filed September 18, 1963;

Order entered by the Court ordering the physical examinations, dated September 18, 1963;

Order of the United States Court of Appeals for the Seventh Circuit entered September 24, 1963, staying proceedings.

Said portions of the record, after having been so certified, shall be delivered to the attorneys of record for the Respondent and shall be filed by them in the Supreme Court of the United States as its rules provide, a certified copy of this Entry to be attached.

DATED this 25 day of October, 1963.

Cale J. Holder
Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,	
v.	
THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, *Third Party Defendant.*	No. IP 62-C-285

CLERK'S CERTIFICATE

I, Robert G. Newbold, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the foregoing is a true transcript of copies of proceedings and pleadings had and filed in the above cause, as listed and designated in the Index of this transcript.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Court at Indianapolis, Indiana, this 25 day of October, 1963.

Robert G. Newbold, *Clerk*
United States District Court
Southern District of Indiana

By: Arthur J. Beck
Deputy Clerk

IN THE

Supreme Court of the United States

October Term, 1964

No. 8

Robert L. Schlagenhauf, *Petitioner*

v.

Cale J. Holder, United States District Judge for the Southern District of Indiana, *Respondent*

On Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

Robert S. Smith
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Wilbert McInerney
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Washington, D. C.

David A. Steckbeck
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Indianapolis, Indiana

Charles T. Bate
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Counsel for Petitioner

Press of Byron S. Adams, Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 8

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

On Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

The Petitioner files this reply brief directed to the contentions of the Respondent that this Court in reaching its decision should disregard the constitutional provisions, federal statutes and federal rules involved and to confine its interpretation exclusively to Rule 35(a), Federal Rules of Civil Procedure (Res. Br. 2). Secondly, that this Court should disregard the record before the United States Court of Appeals for the Seventh Circuit and substitute a record incorporated in the brief of the Respondent as an appendix (Res. Br. 4, 8, 16, 17, 18).

The Respondent relies heavily upon *Sibbach* [1] and *Beach*.[2] These decisions certainly did not disregard constitutional provisions, federal statutes and federal rules involved and the violation of substantive rights. In fact, both courts were considerably concerned with substantive rights. In *Sibbach*, the court emphasized that there could be no restriction on substantive rights when it stated "The first is that the court shall not 'abridge, enlarge, nor modify the substantive rights,' in the guise of regulating procedure." In *Beach* the court was also concerned as to whether substantive rights were being abridged, enlarged or modified.

These two decisions were made at a time when the Federal Rules of Civil Procedure were in their infancy. Since then court decisions interpreting the rules have filled volumes of reports. The courts, however, have jealously refused to interpret Rule 35(a) in any way which would interfere with the substantive rights of a litigant in civil litigation.

In both *Sibbach* and *Beach* there were well reasoned dissenting opinions that Rule 35(a) should not be invoked to overrule *Union Pacific R. Co. v. Botsford*, 141 U.S. 250.

While this Court in *Sibbach* held that the plaintiff should submit to a physical examination, there was nothing to indicate that the Court contemplated that an examination would be made without a showing of the requirements embraced in Rule 35(a).

In *Beach* the court was very careful to restrict its ruling to the blood test requested. In doing this, it is

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[1] *Sibbach* v. *Wilson & Co., Inc.*, (1941), 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479

[2] *Beach* v. *Beach*, (App. D.C. 1940), 114 F. 2d 479, 3 F. R. Serv. 35a.5, Case 2.

difficult to believe that the court ever intended that its decision would be construed to prompt the question insofar as this Petitioner is concerned, "What harm does this cause Petitioner?" Nor would it be contemplated that the language of the court would be subjected to the paraphrase, "if the examination shows nothing was wrong with Petitioner, he certainly was not harmed; and if the examination shows his physical or mental condition caused this tragic accident, a miscarriage of justice has been averted" (Res. Br. 11).

There is nothing in either decision to indicate that either court was establishing a precedent which twenty-four years later would justify physical and mental examinations of all "parties" in civil litigation under Rule 35(a).

The Respondent attempts in support of his position that there would be inconsistency in different substantive rights and constitutional privileges (Res. Br. 18). Keeping in mind the large number of decisions already applying to an interpretation of the Federal Rules of Civil Procedure and the many decisions to come, there probably will be plaintiffs asserting substantive and constitutional rights if mental and physical examinations are ordered. Assuming a plaintiff was claiming personal injury to an arm or a leg, it would be difficult to believe he would willingly submit to examinations by two doctors each in the respective fields of internal medicine, ophthalmology and psychiatry and three in the field of neurology.

The record in the United States Court of Appeals for the Seventh Circuit was certified to this Court and incorporated in the Transcript of Record at the direction of the Petitioner and Respondent and under the direction of the Clerk of this Court.

The petition for writ of mandamus was filed in the United States Court of Appeals for the Seventh Circuit on March 13, 1963. Judgment was entered on July 23, 1963 affirming the decision of the District Court (T. 84). At no time prior to the filing of the writ of mandamus and judgment of the court, was a modification of the order requiring nine examinations made. Obviously it was contemplated that if the decision of the District Court was affirmed, the Petitioner would be required to subject himself to the nine examinations. On September 18, 1963, however, the Respondent entered an order in the proceedings in the United States District Court for the Southern District of Indiana, Indianapolis Division, reducing the number of examinations from nine to four. It is now contended that this becomes the valid order in the case and that the record before the United States Court of Appeals for the Seventh Circuit should be disregarded (Res. Br. 8, 17). In fact, it was contended in the brief filed by the Respondent in opposition to the petition for certiorari that the signing of this order on September 18, 1963 made this question now before the Court moot (Br. for Res. in Opp. 2, 7). It is even suggested by the Respondent that the reduction in the number of examinations would be such that the Petitioner should voluntarily submit to the four examinations (Res. Br. 16). The position of the Petitioner is that he should not be required to submit to examinations by four doctors any more than he would be required to submit to examinations by nine doctors. The mere reduction in the number of doctors in itself is not controlling. If the number could be reduced to four, it could be reduced to six. By the same reasoning, if the number of doctors to make the examinations is controlling, it could be increased from nine. The posi-

tion of the Petitioner is that under all circumstances involved in this particular case, he should not even be examined by one doctor.

In any proceedings involving an interpretation of Rule 35(a) the substantive and constitutional rights of the person to be examined should at all times be safeguarded and the interpretation of this rule should not be confined to the rule itself.

The Appendix made a part of the Respondent's brief fails to conform with Rule 40-5 of this Court in that it is irrelevant and immaterial to the facts and issues in this cause based upon the Transcript of Record as printed at the request of the Clerk of this Court. Those portions of the Respondent's brief to which reference is made to the Appendix made part of the brief should be disregarded.

Respectfully submitted,

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